83-301

No.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

ALASKA LUMBER & PULP COMPANY, INC.,
an Alaska corporation,
Petitioner,

vs.

REID BROTHERS LOGGING COMPANY,
an Alaska corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: August 22, 1983

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QUESTIONS PRESENTED

(1) *Denial of Jury:* Whether petitioner was denied its constitutional right to a jury trial and its right under Fed. R. Civ. P. 38(d) and 39(a) to withhold consent to plaintiff's withdrawal of jury demand upon the eve of trial, on the ground that petitioner had waived its rights by opposing a jury demand by plaintiff two years before.

(2) *Standard for Inferring Conspiracy:* Whether two firms in the same industry can be found to have conspired, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) based solely upon (1) a variety of legitimate business and personal contacts, plus (2) similar but not consciously parallel conduct.

STATEMENT REQUIRED BY RULE 28.1

Alaska Lumber & Pulp Company is an Alaska corporation and is affiliated with Alaska Pulp Company, a Japanese corporation.

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October Term, 1983

Alaska Lumber & Pulp Company, Inc.,
an Alaska corporation,
Petitioner,

vs.

Reid Brothers Logging Company,
an Alaska corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Alaska Lumber & Pulp Co. (ALP) petitions for a Writ of Certiorari to review the judgment and opinion of the Ninth Circuit Court of Appeals entered in this action. ALP also joins in the Petition for a Writ of Certiorari to review the same judgment submitted by co-defendant Ketchikan Pulp Company (KPC), pursuant to Sup. Ct. R. 19.4.

OPINIONS BELOW

The majority and dissenting opinions of the Ninth Circuit Court of Appeals are reported at 699 F.2d 1292. The findings of fact and conclusions of law entered by the district court are not officially published, but are unofficially reported at 1981-2 Trade Cases ¶ 64,228 at p. 73,881. The opinions, findings and conclusions are set forth in Appendices A and B respectively.

JURISDICTION

The opinions of the Ninth Circuit Court of Appeals were filed on March 1, 1983. A timely Petition for Rehearing and Suggestion for Appropriateness of Rehearing En Banc was filed. This Petition was denied on May 23, 1983. See Appendix E. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the district court was invoked under 28 U.S.C. § 1337. Jurisdiction of the Ninth Circuit Court of Appeals was invoked under 28 U.S.C. § 1291.

CONSTITUTIONAL, STATUTORY, AND PROCEDURAL PROVISIONS INVOLVED

This case concerns the proper interpretation of the federal antitrust laws, specifically sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and section 4 of the Clayton Act, 15 U.S.C. § 15. It also involves the seventh amendment to the United States Constitution and the meaning of Rules 38(d) and 39(a), Fed. R. Civ. P. These provisions are set forth in Appendix D to this petition.

STATEMENT OF THE CASE

This petition asks the Court to review and correct the lower courts' denial of this petitioner's fundamental right to a jury trial (which resulted in judgment in plaintiff's favor in the ensuing bench trial against ALP and KPC for $1,489,881), and to decide an important and recurring issue of federal antitrust law which has created conflicts in the circuit courts.

Other questions crucial to the consistent interpretation and application of the Sherman Act are raised in the companion petition filed herein by KPC.

The first issue dealt with here arises because the district court, with the sanction of the majority opinion of the appellate court, ruled that plaintiff could unilaterally withdraw its jury demand without the consent of the opposing parties. This is directly contrary to the explicit provisions of Rules 38(d) and 39(a), Fed. R. Civ. P. The decision is also in conflict with other federal and state appellate decisions. The error is of special significance because it concerns the destruction of a right guaranteed by the Constitution: the right to trial by jury.

The second issue presents this Court with an opportunity to provide much needed definition to the kinds of conduct which may lead to an inference of antitrust conspiracy. The district court, again upheld by the appellate majority, inferred a conspiracy based upon general inter-firm contact plus similar, but not consciously parallel, conduct, even though that conduct was consistent with unilateral decision-making by each defendant. The decision creates a sharp conflict among the circuit courts on the issue of what are the legal standards for inferring a conspiracy to restrain trade. Proper definition of the limits of inference as to antitrust conspiracy poses an important, recurring issue of antitrust law which has engendered much conflict among the circuits and should be settled by this Court. In fact, this Court recently granted certiorari to consider conspiracy issues very similar to those raised here. In *Weyerhaeuser Co. v. Lyman Lamb, Co.*, docket No. 81-1618, this Court granted certiorari to consider whether an antitrust conspiracy could properly be inferred from inter-firm conduct plus consciously parallel conduct. However, the parties in *Weyerhaeuser* dismissed the appeal by stipulation on June 14, 1983, (51 U.S.L.W. 3903) thereby leaving the issues unresolved. This case presents an even sharper focus for formulating appropriate legal standards on the issue of conspiracy.

The facts which give rise to the two questions presented here may be briefly stated.

A. Facts Surrounding Question (1)

On March 13, 1975, Reid Brothers Logging Company (RBLC) commenced an action under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, seeking treble damages and injunctive relief against KPC and ALP. At the outset the case was consolidated for discovery with four companion cases. In each case plaintiffs filed a jury demand and sought consolidated trial of the five cases. On July 27, 1978, defendants moved to strike the jury demand, arguing that a jury could not absorb in a consolidated trial the facts of five complex and diverse antitrust cases, especially under the facts and theories then advanced by the plaintiffs. This motion was informally denied by District Judge Morell Sharp, to whom the cases were originally assigned, in an unreported chambers conference on July 31, 1978. Instead, in partial response to the motion, Judge Sharp tentatively ruled that the five cases would not be tried together, but rather that RBLC's case would be tried first as a pilot case. His reasoning was that the presentation of the theories and facts of five cases to a jury would present too many complexities, but that a jury could probably understand the facts of one case.

The issues of consolidation and jury trial were again argued with several other motions during a proceeding known as "Law Day'" on October 27 and 31, 1978. The court rejected plaintiff's renewed pleas for consolidation and adhered to its initial ruling that the Reid Brothers case would be tried separately to a jury.

Subsequently all five cases were reassigned to District Judge Barbara Rothstein due to Judge Sharp's illness. Judge Rothstein first met with counsel on May 29, 1980. After setting a trial date the court inquired, *sua sponte,* whether all parties would consent to waive the jury. RBLC promptly agreed to withdraw the jury demand which it had previously fought so hard to protect; KPC refused to consent to the withdrawal unless all parties agreed; and ALP refused to consent and instead filed a jury demand of its own. RBLC moved to strike ALP's demand and on July 7, 1980, one month before trial, the court granted RBLC's motion. The stated ground for this ruling was ALP had waived its rights by its opposition to a jury in the then five consolidated actions some two years before. Judge Rothstein denied ALP's demand despite the fact that for years all parties, including ALP, had proceeded with the understanding that there would be a jury, and despite the fact that the posture, facts and theories of the case had changed dramatically since the arguments concerning whether a jury could deal with five cases simultaneously. Fed. R. Civ. P. 39(a) was not complied with in that there was no written or oral stipulation whereby the parties mutually manifested consent to trial by the court without a jury.

A divided panel of the Ninth Circuit Court of Appeals affirmed the district court's order. The majority held that ALP had "waived" its right to a jury. It was also held that Rules 38(d) and 39(a) were "technical" and "formalistic" requirements which need not be adhered to, but instead were subservient to Fed. R. Civ. P. 1 which calls for "the just, speedy, and inexpensive determination of every action." Allowing ALP a jury trial, the majority held, would "frustrate the purposes of the Federal Rules of Civil Procedure." The dissent strongly objected, finding that the majority position "ignores the practicalities of litigation" and "denigrates" the principle that every presumption should be made against the waiver of a jury.

B. Facts Surrounding Question (2)

The heavily regulated timber industry in Southeast Alaska centers upon a 500 mile stretch of timberland along the Alaskan-Canadian Border, virtually all of which is within the Tongass National Forest, under the control of the U.S. Forest Service (USFS). The quality of the majority of the timber is such that it can be used only for pulp. The USFS tried for decades to entice a pulp mill to the region. Because of the remoteness, high costs, and huge capital requirements, industry would not locate in the region under normal economic conditions. To achieve economic growth the USFS altered the free market conditions by enacting regulations which compelled that timber be processed in Alaska rather than exported as round logs. This limited the log market to mills in Alaska and thus, due to the nature of the timber, primarily to any pulp mill there. The USFS also offered long term contracts (50 years) with a guaranteed supply of timber if a pulp mill was built in conjunction with the sale. These were the only such offerings made in U.S. history.

In 1951 KPC successfully bid the first such offering, and opened a pulp mill in Ketchikan, Alaska, in 1954. The sale area was located in the South Tongass, an administrative area created by the USFS, near Ketchikan. In 1956 another long term sale area was successfully bid by ALP. This was located in the North Tongass. ALP opened its pulp mill in late 1959 in Sitka, Alaska. Although the USFS awarded two other long term sales for pulp mills, no other company built a pulp mill in the region, for reasons unrelated to this lawsuit. Thus since 1960 KPC and ALP have operated the only pulp mills and provided the only market for the bulk of the logs harvested in Southeast Alaska.

ALP also operated a sawmill known as Wrangell Lumber Company (WLC) in Wrangell, Alaska, where higher quality logs were cut into cants[1] for export to Japan. Prior to 1969 KPC had no sawmilling facilities and thus sold or exchanged some of its higher quality logs to WLC for sawmilling. After 1969 KPC, at the urging of the USFS, expanded to include sawmilling. Throughout the period other smaller sawmills also operated.

The USFS also sold smaller short-term timber sales (approximately one to five years duration) through competitive bidding. Both ALP and KPC were expected by the USFS to obtain timber from these sales and both bid for these sales. The USFS set the dates when these sales were offered, where they would be, the type of logging equipment needed, the minimum price (stumpage) at which the timber would be sold and all other facets of the sales. These sales usually would be an extension of or near an existing logging operation so that that operator would have a bidding advantage for that sale due to not having to pay for moving, camp set-up or similar expenses.

Anyone meeting USFS financial requirements could bid on timber sales. A logger who purchases a sale, logs it, and sells the logs is called a "purchase logger." A logger who contracts to log a sale owned by someone else is called a "contract logger."

RBLC was a logger who had logged for both KPC and ALP. It bid, without competition, a sale called Muddy River No. 3 in 1972. As a purchase logger it obtained offers for the logs from KPC and another sawmill. Finding that it needed several hundred thousand dollars to start operations, RBLC asked KPC for financing. KPC agreed to provide financing but asked for security. Offering nothing else for security, RBLC assigned its rights to the Muddy River No. 3 sale to KPC (which was approved by the USFS at RBLC's request), and entered into an agreement with KPC to log the sale as a contract logger. RBLC never contacted ALP either to sell the logs or to ask about alternative financing. KPC and RBLC subsequently had a dispute, and RBLC terminated operations in September, 1973.

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[1] A cant is a log which has been cut into dimensions larger than ordinary dimensional lumber but sufficient to meet the USFS export manufacturing requirements.

In March 1975 RBLC filed suit against KPC and ALP alleging that defendants had conspired to restrain trade and had jointly monopolized[2] the timber industry in Southeast Alaska in violation of Sherman Act §§ 1 and 2. RBLC also sued KPC for breach of contract. RBLC's Sherman Act damage claim was based on the assertion that KPC caused RBLC to assign the Muddy River No. 3 sale to KPC. This, RBLC argued, resulted in its losing the "purchase logger rights" to the sale which meant that it was unable to sell the logs (as opposed to contracting for services) as an entrepreneur. RBLC thus argued that it was damaged because it could not take advantage of the surprise increase in the demand for logs in 1973-74, thereby losing the profits in selling the logs in that market.

The district court, without citing any legal authority and adopting virtually verbatim findings of fact proposed by RBLC, found there was a conspiracy because the evidence showed (1) there had been contacts and joint projects between defendants, and (2) there had been some similarity in the way their businesses were conducted from which the court inferred concerted action. The district court did not find that this similar conduct constituted "conscious parallelism," nor did any of the conduct involve or pertain to the events RBLC claimed injured it. (See discussion, *supra*.) Moreover, no finding was made that any of the activity would have been contrary to the business self-interest of either defendant if it had unilaterally engaged in the same conduct (*i.e.* the conduct was fully consistent with individual business conduct). Likewise, the district court did not find that any of the communications or projects between defendants involved or pertained to the claimed damage-causing events. Instead, the reasoning was simply that any act by either defendant was part of a conspiracy to injure RBLC.

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[2] Although not directly analyzing the issue of joint or "shared" monopoly, the district court, in seven conclusionary sentences and without citation to authority, found that defendants "attained and exercised monopoly power in violation of section 2." ALP appealed this ruling to the circuit court on the ground that it could not be liable under a nebulous theory of shared monopoly. The circuit court affirmed but on the basis of a conspiracy to monopolize. App. A-10. Thus liability is bottomed on a claim of conspiracy and if there was no conspiracy there is no section 2 liability.

A majority of the court of appeals affirmed, again without legal analysis, essentially repeating the district court's conclusions.

REASONS FOR GRANTING A WRIT

A. Defendants Were Wrongly Denied a Jury Trial

The district court and the court of appeals have turned their backs on the plain requirements of Rules 38(d) and 39(a). In holding, over a strong dissent, that "a literal reading of Rule 38(d) would act as an instrument of delay and frustrate the purposes of the Federal Rules of Civil Procedure" (App. A-24) the majority wrote off ALP's right to a jury as a "technical requirement" and an "instrument of delay." **The majority has established the principle that one party alone may control whether there is a jury trial by unilaterally withdrawing its jury demand over the objection of an opposing party if the opponent has at any time in the past under any different circumstances opposed its** adversary's jury demand. A subjective rule is thus established whereby the district court is allowed to weigh the reasons for demanding a jury and to second-guess a party's intentions. This new rule applies regardless of what has occurred in the interim and despite the applicable Rules and the U.S. Constitution. The ruling inequitably allows the party filing the first jury demand to change its mind on this fundamental matter but denies a reciprocal right to the opposing party.

1. The Appellate Court Decision Creates a New Rule in Derogation of Fed. R. Civ. P. 38(d) and 39(a)

The seventh amendment to the Constitution unequivocally guarantees a right to a jury trial in civil cases such as this. This Court has repeatedly acknowledged that this right must be preserved wherever possible. E.g. *Jacob v. City of New York,* 315 U.S. 752, 752-53 (1942) ("A right [of jury trial] so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."). This Court has granted certiorari when a party has been deprived of its right to a jury

> because "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care."

Beacon Theatres v. Westover, 359 U.S. 500, 501 (1959), *quoting, Dimick v. Schiedt,* 293 U.S. 474, 486 (1935). Thus this Court has recognized there are "[s]pecial and important reasons for the grant of certiorari" when lower courts "deprive litigants of their right to a jury determination." *Rogers v. Missouri P.R. Co.,* 352 U.S. 500, 510 (1957).

The procedures implementing this right are found in Rules 38(d) and 39(a). Rule 38(d) provides that "[a] demand for trial made as herein provided may not be withdrawn without the consent of the parties." The means for manifesting that consent is specified in Rule 39(a):

> The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. . . .

The district court ignored the clear language of these Rules. There was no stipulation to a court trial or consent to RBLC's withdrawal of its jury demand. Unless this Court intervenes, the high sounding principles regarding the "fundamental and sacred" right to a jury and the implementing provisions of the Rules of Civil Procedure become sheer rhetoric. The majority below expressly "looked beyond the facial language" of the Rules and created a new rule which would allow judges to make subjective judgments as to whether a party has somehow waived a jury trial without expressly consenting to the withdrawal of a jury demand.

In dismissing the Rules as "formalistic" and "technical," the majority created a conflict with other appellate authority which had held that the rules regarding the withdrawal of a jury demand require strict compliance. *See, Palmer v. United States,* 652 F.2d 893, 896 (9th Cir. 1981), where the court refused "to create an exception to the precise terms of [Rules] 38(d) and 39(a)" in order to find appellant had waived a jury, even though he had allowed the trial to the court to proceed to conclusion without objecting. The ruling represents a complete departure from the principle that Rule 39(a) should be applied according to its literal terms. 5 Moore's *Federal Practice* ¶ 39.03 at 39-7 (2d ed. 1980): "The theory of Rule 39(a) is that it should operate rather mechanically." The ruling is also contrary to state appellate decisions which have considered whether a right to jury trial has been waived under similar rules and found that the precise strictures of the applicable rule or statute require full compliance. *See, Lee Wing Chau v. Nagai,* 44 Haw. 290, 353 P.2d 998 (1960); *Okmulgee Producing & Refining Co. v. Wolff,* 88 Okl. 188, 212 P. 415 (1923); *Hoover v. Abell,* 231 S.W.2d 217 (Mo. App. 1950).

In place of the objective criteria of Rules 38(d) and 39(a) the majority substituted an uncertain and indefinite standard which would allow the district court to interpret the prior conduct of the parties to determine whether one has unintentionally waived its right to a jury trial. The district court is also allowed to weigh stated and unstated reasons for a party's change of position on the jury issue and to determine if a party has sufficient reason for doing so. The creation of this subjective rule is a giant step in taking away, rather than "jealously guarding," this constitutional right. To deny a party's right to a jury trial on the ground that to do so will achieve a "just, speedy, and inexpensive" trial is to deprive ALP of its fundamental rights to assist the court in keeping its calendar current.

2. ALP's Earlier Opposition to a Jury Trial Did Not Constitute a Waiver of Its Right to a Jury

The fact that ALP years earlier, during the pretrial discovery phase of the case, objected to plaintiff's jury demand should be immaterial. However, the majority justified the district court's order by ruling that ALP had "waived" its right to a jury by moving to strike its adversary's jury demand in a completely different context. This, the majority concluded, demonstrated a failure to rely on RBLC's jury demand and thereby constituted a waiver by ALP of its rights. Thus, due to a reluctance to undo the results of a substantial investment of judicial time and resources, ALP's fundamental jury right was made a sacrificial offering on the altar of judicial expediency. The net effect is to turn the process on its head by allowing one party, the same party which earlier had strenuously argued that a jury was absolutely necessary, to change its mind and unilaterally determine whether the cause proceeds as a jury trial. The error of this reasoning was articulated by Judge Reinhart in his dissent:

> Merely because defendants argued at an early stage in the litigation that plaintiff did not have a right to a jury trial does not in any way suggest that, if the court concluded they were wrong, defendants would be willing to waive their continuing right to object to a subsequent change in position by plaintiff. Certainly, there would be no reason for defendants to give up their right to change their own position if circumstances changed. From defendants' standpoint, the implied waiver suggested by the majority served no purpose, other than to put the plaintiff in the position the majority finds it was—having exclusive control over the decision whether the trial would be by jury or by court, with the right to make that final unilateral decision based on the circumstances that existed just prior to the time of trial. I see no reason why objecting to an opponent's jury demand, whatever the basis for the objection, should entail such a consequence.

There is nothing in the Rules, decisional law, or the Constitution which prevents a party from changing its mind on this issue. In fact, the majority's opinion directly conflicts with the Ninth Circuit's earlier view that a party's change of position on the jury issue *should* be respected. *See DePinto v. Provident Security Life Insurance Co.*, 323 F.2d 826, 833 (9th Cir. 1963).

While no justification for a change in position on this issue should be necessary, sound substantive and tactical reasons for such a change are easily found in this case. ALP's original motion to strike the jury was filed almost two years before RBLC agreed to withdraw its jury demand. In the interim it became firmly established that only one of several complex antitrust cases would be tried rather than several cases together as advocated by RBLC at the time the motion was made. During that time discovery continued, facts developed and the issues were narrowed and refined. Many of RBLC's claims were relegated to background status as a result of the Law Day hearings. The pretrial order was lodged, jury instructions were filed, and motions were made and granted which substantially reduced RBLC's damage claims. Entire theories of liability and damages were rejected by the district court and dropped by RBLC. The precarious nature of RBLC's claims became manifest when Judge Sharp expressed serious reservations that RBLC "may have a difficult task in proving that defendants' antitrust violations prevented Reid Brothers from logging the Muddy Rivers [sic] site as a purchase logger." (Even the majority recognized that this causation issue was a "vital question" which was "very close." App. A-15.) Due to the drastic change in circumstances in the stature of the case ALP had abundant reason to change its mind and seek a jury, thereby relying on RBLC's jury demand. The district court and the majority, without stating reasons, disregarded these facts and, applying a subjective test, allowed RBLC to switch positions but denied the same right to the other parties. The fundamental unfairness of allowing RBLC to change its position for tactical reasons, yet denying a reciprocal right in ALP, is self-evident.

To bolster its conclusion the majority characterized the single motion as "persistent efforts of ALP to defeat RBLC's jury request." App. A-23. The motion was filed before Judge Sharp entered his August 30, 1978, order setting the Reid Brothers case to be tried first, and the briefing on the motion continued after that date. The motion was not renewed by defendants during the Law Day hearing in October as suggested by the majority. Judge Sharp even commented to RBLC's counsel that defense lawyers were not arguing the jury issue. It was RBLC who raised again the trial consolidation issue, and, in fact, conceded that defendants were arguing that "the cases together would be too complex for a jury." (Oct. 31, 1978, Hearing Tr., p. 279.) After the issue was finally resolved in October 1978, ALP took no further steps to "defeat" a jury. To the contrary, ALP filed comprehensive jury instructions and approved and signed a Pretrial Order which provided that the case would proceed as a jury trial. Thereafter ALP relied upon the fact there would be a jury and acted accordingly. Moreover, regardless of the arguments made in 1978, the changes which occurred thereafter, as described above, gave ALP abundant reason to reassert its jury right, just as they gave RBLC reasons to drop its jury demand. As the dissent stressed, even if defendants may not have initially relied on RBLC's jury demand, they did "rely from the outset on the Rules that provide that once a demand is made, it cannot be withdrawn unilaterally." App. A-31.

3. The Majority's New Rule Imposes an Unworkable Standard

The Rules provide easily definable means for determining whether consent to a jury demand withdrawal has been given. Under Rule 39(a) only two simple questions need be asked: (1) is there a written stipulation filed with the court, or (2) is there an oral stipulation made in open court and entered on the record? Under the majority's holding, if a party at any time opposes a jury trial a court can deem such conduct a waiver and hence arbitrarily destroy that party's right later to insist on a jury. In exercising this discretion the district court presumably would weigh the nature of the previous conduct, the status of the case, and whether crediting a party's seventh amendment rights might interfere with a "just, speedy, and inexpensive determination" of the case. The record shows here that the district court's primary motivation in ignoring ALP's refusal to consent to a bench trial was the court's preoccupation with getting the case to trial as soon as possible in view of delays caused by Judge Sharp's illness.

The Rules expressly provide that once a jury demand is filed it cannot be withdrawn absent simultaneous and unanimous consent, thereby giving "each party an effective veto over the withdrawal of a jury demand . . ." *Rosen v. Dick*, 639 F.2d 82, 92 (2d Cir. 1980). The Rules provide certainty. Adherence to an objective standard will limit wasteful retrials because the likelihood of lower court error is diminished if it is clear that strict compliance with the Rules is necessary. A rule providing "certainty" will go much further to accomplish a "just, speedy, and inexpensive determination of every action" than the ambiguous, uncertain and unfair criteria sanctioned by the majority.

4. Conclusion

The majority's decision conflicts with other authority and has radically departed from accepted procedure as defined by the Federal Rules. It is implicit in the majority's opinion that a litigant cannot rely on the Rules and will act at its peril in doing anything which may suggest waiver of a jury. The majority's decision regarding waiver directly conflicts with this Court's clear direction that courts should indulge every reasonable presumption *against* waiver of the right of jury trial:

> It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver.

Hodges v. Easton, 106 U.S. 408, 412 (1882). *Accord, Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1936). This

Court should grant certiorari and remand the case for jury trial.

B. This Case Provides a Vehicle for This Court to Clarify the Legal Standards Under Which Conspiracy Can Be Found Under Section 1 of the Sherman Act

Antitrust "conspiracy" is not a self-defining concept, and finding liability by inference is nebulous at best. Lower courts have struggled to define and apply appropriate legal standards, resulting in a patchwork of rulings as to whether evidence exists to establish a conspiracy under the Sherman Act. This has resulted in inconsistent and inequitable conspiracy findings. These conflicting decisions have made it impossible for business, let alone lawyers or the courts, clearly to define what is legally competitive and what may lead to enormous treble damage liability.

This case is an outstanding example of what can happen in the absence of clearcut guidelines. Neither the district court nor the appellate majority expressly applied the law to the facts. Instead, each court concluded that there was an all-encompassing conspiracy that permeated all facets of a complex industry, and thereby found RBLC automatically entitled to damages. Certiorari is particularly appropriate here because it dramatizes issues which are fundamental to the proper enforcement and application of the Sherman Act: Whether a conspiracy can be inferred from the fact of (1) business and social contact between employees of the two defendants plus (2) similar, but not even consciously parallel, conduct which (a) is consistent with what would be expected in a competitive market, and (b) is not the basis for the damage claims made by the plaintiff.

1. Conspiracy Cannot Be Inferred From Legitimate Inter-Firm Contacts

The majority inferred that a conspiracy had been "sustained" by an "uninterrupted pattern of communications." App. A-5. The critical missing link is that there is nothing tying these communications to any of the conspiratorial conduct cited by the majority, nor to the conduct RBLC claimed injured it.

It is true that over a sixteen-year period before the complaint was filed there had been business dealings and friendly contacts between the defendants. Yet this is hardly surprising since defendants were the only businesses of their kind in a remote section of the country. The USFS characterized these mills as a "pioneering undertaking" which would "be accompanied by unusual risks due to many unknown conditions." (USFS-KPC long-term contract, 1951) In surmounting these "unusual risks" and in breaking this new frontier it is not surprising that the two businesses did share certain information. Consider the type of information the district court found so damning: logging techniques, construction devices, log scaling, wage scales, union contracts, matters of mutual interest relating to the USFS, and log towing rates. The business dealings included the fact that in the 1960s KPC sold some saw and cedar logs to ALP because ALP had special use for these grades and species. ALP also obtained some log price information from KPC in 1959 before ALP opened its mill because it found its pre-opening pro forma to be inaccurate and KPC was the only existing source for such information. Collusion was also found because KPC's timber manager was "a personal friend" of ALP's counterpart[3] and had spoken with other ALP executives. Defendants were even condemned because they "had frequent contact at meetings of trade associations." App. A-46.

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[3] **Both men left the business before the applicable statute of limitations.**

While defendants' employees discussed many matters of common interest, and defendants did some business with one another, the district court jumped to the conclusion that these contacts led to anticompetitive agreements not to bid against each other for timber sales, to bid against "outside" mills, etc. The drawing of an inference of illegal conduct from these legitimate and necessary contacts conflicts with established precedent that an inference of conspiracy cannot be drawn from evidence of an opportunity to conspire. *Weit v. Continental Ill. Nat. Bank & Trust Co. of Chicago,* 641 F.2d 457, 462 (6th Cir. 1981) *cert. denied* 455 U.S. 988 (1982); *H.L. Moore Drug Exchange v. Eli Lilly & Co.,* 662 F.2d 935, 941 (2d Cir. 1981) *cert. denied* 103 S. Ct. 176 (1982). The courts here have done precisely the opposite: they have inferred a conspiracy because of the contacts and have reasoned therefrom that all conduct by defendants was the product of that conspiracy. It is easy to find a conspiracy if one begins with a presumption of illegal conduct. But the presumption should be the other way. *Boise Cascade Corp. v. FTC,* 637 F.2d 573, 581 (9th Cir. 1980).

The majority would require unreasonable monastic conduct by businessmen, shunning friends and business acquaintances, in order to avoid the very inferences made here. This conflicts with this Court's repeated admonition that the antitrust laws do not preclude contacts and information exchanges among businesses. *United States v. United States Gypsum Co.,* 438 U.S. 422, 441 n.16 (1978); *Appalachian Coals, Inc. v. United States,* 288 U.S. 344 (1933); *Maple Flooring Manuf. Assn. v. United States,* 268 U.S. 563, 583 (1924). As this Court emphasized in *United States v. United States Gypsum Co., supra,* "salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good faith error of judgment." While *Gypsum* stressed the need for clear standards in criminal conspiracy cases, these observations are equally pertinent in civil antitrust cases. *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981) (discussing "the possibility that severe antitrust penalties will chill wholly legitimate business agreements.").

This Court must declare the extent to which mere contacts among competitors may be impermissible. Otherwise others may be caught in the same trap as ALP and be found to be co-conspirators due to an innocent exchange of information or business dealings a decade or more before a lawsuit is filed. In this case the USFS predicted that this "pioneering undertaking" would be "accompanied by unusual risks due to many unknown conditions." A risk that ALP did not foresee was that it would be exposed to treble damage liability from the mere fact of frequent contact with the only other pulp mill in Southeast Alaska.

2. Conspiracy Cannot Be Inferred from Similar Business Conduct When That Conduct Is Consistent with Individual Business Decisions

The thrust of the majority decision is that similar business practices, coupled with unrelated inter-company communications reflecting an opportunity to conspire, can support a finding of illicit agreement. The practices were not found to be consciously parallel, or even the direct product of any of the communications identified by the district court's findings. In fact, the legal theory upon which the majority reached its conclusion is nowhere stated.

Other decisions have been unanimous in applying the rule that consciously parallel conduct, even when accompanied by inter-firm contact, can rise to the level of conspiracy *only* where the challenged conduct would be inconsistent with or contrary to the self-interest of the individual firm if acting unilaterally. *E.g., Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 327 (D.C. Cir.

1982) *cert. denied* 103 S.Ct. 86 (1983) ("Only when the observed parallel behavior is inconsistent with the behavior to be expected from each actor individually pursuing its own economic interest may an agreement be inferred from parallel conduct.") ; *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 884 (9th Cir. 1982) *cert. denied* 103 S.Ct. 1777 (1983) ("[T]he courts also require that the plaintiff demonstrate that the allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment.") ; *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir.) *cert. denied* 454 U.S. 1031 (1981) ; *Weit v. Continental Illinois National Bank & Trust Co., supra.* Otherwise, as a matter of law, individual competitive decision-making is as likely and logical an inference to draw as concerted conduct, since "like businesses are generally conducted alike." *Independent Iron Works, Inc. v. U.S. Steel Corp.*, 322 F.2d 656, 661 (9th Cir.) *cert. denied* 375 U.S. 922 (1963).

If a conspiracy cannot be found when the challenged conduct is consciously parallel yet not inconsistent with unilateral activity, it is impossible to see how one can be inferred where the conduct is not even consciously parallel but is merely similar. Yet that is exactly what the majority has done. It has drastically departed from the accepted standard and found a conspiracy merely because of similar activities irrespective of whether the conduct is equally consistent with unilateral decision making. Absent an explicit statement of law from this Court there will remain confusion which will lead to aberrations such as this case.

The majority inferred conspiracy from three general "activities".[4] These will be examined in some detail in order to show that they are consistent with unilateral decision making and hence not conspiratorial under established authority:

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[4] At RBLC's urging, the courts below placed RBLC's conspiracy proof into specific categories. But a conspiracy cannot be inferred from a collection of unrelated events because "there can be no synergistic result . . . from a number of acts none of which show

a. *Refusal to compete* (App. A-4): It was found that defendants confined their bidding on independent timber sales to those offered near their long-term sale area and thereby refrained from bidding against each other. Simply stated, both defendants followed the similar course of limiting their bidding to sales in areas in which they normally operated: ALP in the North Tongass and KPC in the South Tongass. This is entirely consistent with individual business conduct for reasons left unaddressed by the courts below. Defendants' mills are about 350 water miles apart. For ALP to bid on sales offered near Ketchikan would be like expecting mills in northern California to compete for timber sales in southern Washington. Such competition is complicated by the fact that the North and South Tongass are separated by large expanses of open water. To tow logs across these stormy seas is dangerous and unreliable due to weather and tides. Greater towing distances also mean greater costs. In fact, when the USFS sets the minimum price (stumpage) for any sale it includes a tow charge to the nearest mill, thereby creating a natural cost disadvantage for any other mill. Other policies of the USFS led to this situation, including the fact that (1) it offered sales within the confines of its own administrative areas (which happen to coincide with the "operating areas" in which the district court found that defendants confined their bidding) specifically to meet the needs of industry within those areas, (2) it announced sales a year or more in advance so that a bidder could plan for its needs from nearby sales rather than gambling on remote sales, and

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causal antitrust injury to [plaintiff]." *Cal. Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 746 (9 Cir. 1979). *Accord, City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 928 (2d Cir. 1981).

(3) it offered sales close to where there was an existing camp in order to allow for continuing operations, thereby giving that operator a natural bidding advantage against outsiders. This latter fact allowed potential bidders to know which sales would be of particular interest to each operator and thereby to steer clear of those seen to entail heavy competition, a situation found "normal" and "not the result of any conspiracy" by other courts. *United States v. Champion International Corp.*, 1975-2 Trade Cas. ¶ 60,453 at p. 67,040 (D. Ore. 1975) *aff'd* 557 F.2d 1270 (9th Cir.) *cert. denied* 434 U.S. 938 (1977).

These facts reveal that the practice of bidding on sales close to one's own mill and not bidding on remote sales in areas where another mill normally operated and had substantial cost advantage is totally consistent with unilateral decision-making. It is also *not* inconsistent with individual firm economic self-interest. Moreover, there was no documentary evidence that defendants agreed to divide up the Tongass or refrain from bidding against each other.[5] Indeed, contemporaneous KPC documents spoke of bidding "to show ALP . . . that we mean business" and to "push ALP out of the South Tongass." ALP internal documents speak similarly of KPC. Despite this, however, the majority found the conduct indicative of a conspiracy.

b. *Exclusion of competing mills* (App. A-6): The majority inferred a conspiracy because each defendant at one time bid against an outside mill (*i.e.* a mill from outside Southeast Alaska seeking a timber sale) or had close business ties with existing sawmills. Strikingly absent from either the district court's findings or the majority's opinion is the citation to any evidence linking the conduct of one defendant to the other or showing that any such activity was inconsistent with unilateral conduct.

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[5] The district court and the majority rely heavily on an internal 1974 KPC memo which discusses the advantages of "realigning" operating areas. This is fully consistent with the fact that due to geographic, economic and administrative reasons discussed the mills' operations had become naturally "aligned." At most, this memo reflects the individual thinking of one KPC employee. It was uncontested that the memo and its contents were never discussed with ALP and were never acted upon. The memo was simply disregarded by its author's superiors.

The district court found that ALP and KPC faced a shortage of timber. Yet, when outside mills bid on the few larger, more desirable sales for which either ALP or KPC would be expected to compete, the court inferred a conspiracy because they did compete. This occurred on a few sales in 1966-67. In every case the sales were either offered as continuations of million dollar operations already established by one of the defendants or had other features which made them uniquely attractive to one or the other defendant. The sales were bid by defendants consistent with their individual business self-interest. Obviously, because defendants were already established they could afford to bid higher than an outside mill. The USFS recognized at the time that "existing industries now have bases in Alaska and local know-how that permits them to bid effectively on timber offerings" and that "the fact that some bidders have an advantage in bidding by their established locations, or special markets, is part of the free enterprise system of doing business." (USFS letter to Senator Jackson, May 9, 1966, Trial Ex. A-935.)

Critically absent is any showing that either defendant could not recover its costs at the price bid on any sale. To find such bidding anticompetitive and predatory, and hence indicative of conspiracy, without some objective standard, creates unbearable hazards for anyone engaged in any bidding practice. As demonstrated by KPC's companion petition to this Court, other courts addressing this question have overwhelmingly found a need for establishing some cost-based standard for determining predatory conduct. The majority decision conflicts with this authority and creates a test which businessmen cannot be expected to understand and abide by, no matter how conscientious they may be.

ALP was found to have conspired with KPC because each had separate business dealings with different sawmills. The district court identified some of these dealings but did not find them parallel, or even similar, and made no finding linking the dealings to any illegal compact. App. A-53. The majority does not either. Instead it dwells on KPC's dealings with the Alaska Prince mill, pointedly omitting any reference to ALP. App. A-6. Again it simply assumes that KPC's actions were in concert with ALP.

ALP had log supply and output purchase agreements with two small sawmills during the relevant time period. In conjunction with these, ALP also provided some financial assistance for mill expansion. All these arrangements were in the individual self-interest of ALP, and no finding was made linking those dealings with KPC. ALP acquired one failing sawmill (Alaska Wood Products in 1968) in order to expand its sawmill production, again in its own individual interest. Both the U.S. Department of Justice and the USFS reviewed the acquisition at the time, and raised no objection. Likewise, the activities of KPC vis-a-vis sawmills were consistent with unilateral decision making by KPC. The district court made no contrary finding nor any finding linking any of the activities together so that a conspiracy could logically be inferred, and the majority[6] does not either.

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[6] The majority makes a passing reference to defendants acting through "controlled corporations." App. A-8. This is nothing more than saying defendants acted through affiliated or subsidiary companies, which certainly is not unique or inconsistent with unilateral business conduct. ALP bid a handful of sales through such affiliates with the full knowledge of the USFS. No finding was made that defendants discussed, let alone agreed on, the use of affiliates, and RBLC claimed no injury because of such bidding.

c. *Payment of "low" log prices* (App. A-8): The majority concluded that both ALP and KPC based prices to loggers on the cost of logging and thus assumed the prices were "artificially low". Since both paid low prices, the assumption went, there must be a conspiracy. There was no evidence that ALP and KPC paid the same or even similar prices, or that the prices varied in unison, or that either defendant even knew what the other was actually paying. Such knowledge was denied by all defendant employees. There was no finding that defendants discussed pricing for logs at any time after ALP commenced operations in 1960. Conspicuously absent was any calculation showing that any price ALP actually paid was below what should have been paid in a competitive market. To the contrary, the evidence showed that under RBLC's expert's methodology, ALP paid RBLC a price *higher* than what RBLC should have expected in a competitive market. This, coupled with the court's finding that KPC also paid RBLC a price higher than the competitive price in 1972, refutes the majority's conclusions.

But the fact that each defendant may have consciously tried to keep low the price it paid for raw materials is certainly not contrary to its economic self-interest and is consistent with unilateral, as opposed to conspiratorial, conduct. *See, Shapiro v. General Motors Corp.,* 472 F. Supp. 636, 648 (D. Md. 1979) *aff'd mem.,* 636 F.2d 1214 (4th Cir. 1980) *cert. denied* 451 U.S. 909 (1981). Inferring a conspiracy to violate the antitrust laws simply because payment to some loggers is regarded as "low", is improper, absent some indication of an agreement between the alleged malefactors.

3. The Conspiratorial Conduct Was Not the Cause of RBLC's Injury

Perhaps the most amazing error is that the similar conduct the majority found supported an inference of conspiracy was not the conduct RBLC claimed injured it. As the majority stated, RBLC's damage claim "rest[s] on the notion that RBLC, in an unrestrained market, could have operated Muddy River No. 3 as an independent purchase logger." App. A-12. It was because it transferred its purchase logger rights in Muddy River No. 3 to KPC that RBLC claimed it was injured. Thus it was found that had RBLC retained those rights and annually negotiated a log price, it could have reaped higher profits in the "bonanza" years of 1973-74.

But this injury-causing event was totally unrelated to the conduct the majority found formed the basis for the conspiracy. RBLC did *not* claim damages due to defendants' refusal to compete against each other for timber sales nor upon the elimination or exclusion of any sawmill. Nor was RBLC's damage claim based on "low prices." No finding was made that RBLC was underpaid as a contract logger or that the purchase logger price offered in 1972 by KPC was below the competitive market price. Damages were found solely because KPC's offer for the logs was based on a multi-year contract and RBLC assigned the sale to KPC, events far different from the conspiratorial conduct.

The lower courts' finding defies logic. Nowhere is found any explanation of how RBLC could have been injured by a conspiracy involving conduct completely apart from conduct found to be conspiratorial. RBLC admittedly did not ask if ALP would buy the Muddy River No. 3 logs despite the fact that RBLC had logged for ALP in the past and had received a higher than competitive market price, or the fact that the sale was in ALP's purported "operating area" in the North Tongass. Even RBLC argued to the district court that the injury-causing conduct of KPC (*i.e.* asking for the transfer of the timber sale as security for the financing) was *dissimilar* from ALP's practice, since the evidence was that ALP had never sought such an assignment when providing financing. The evidence also showed that ALP *did* renegotiate the log price on an annual basis. Despite these fundamental *dissimilarities* in the claimed injury-causing conduct, the majority still inferred a conspiracy.

The majority found ALP liable for conspiracy because KPC's actions were a "manifestation of the conspiracy" made possible by "the continuing cooperation between" defendants. This does not follow: KPC could have asked, and did ask, for the security and other terms for its own business reasons, totally unrelated to any agreement with ALP. KPC's actions vis-a-vis RBLC were totally consistent with individual business conduct. In short, the majority found RBLC automatically injured because of a supposed conspiracy affecting other facets of the market. This is in direct conflict with this Court's rejection of "automatic damages" under Section 4 of the Clayton Act, 15 U.S.C. § 15. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.,* 451 U.S. 557 (1981). It also conflicts with the established law that a finding of one conspiracy does not infer that defendants probably engaged in another. *Golf City, Inc. v. Wilson Sporting Goods Co., Inc.,* 555 F.2d 426, 435 (5th Cir. 1977); *cf. Theatre Enterprises, Inc. v. Paramount Film Corp.,* 346 U.S. 537, 543-44 (1954).

4. The Need for Review by This Court

It has been more than a quarter century since this Court addressed the outer limits of inferring a conspiracy from consciously similar conduct. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra.* The majority below has radically departed from the standards since developed as to the extent similar conduct, coupled with inter-firm contact, can support an inference of conspiracy. This Court recently granted certiorari in another case which raised the issue of whether conscious parallelism plus inter-firm communication could support a finding of conspiracy. *Weyerhaeuser Co. v. Lyman Lamb Co.,* Supreme Court docket No. 81-1618, cert. granted May 17, 1982, 50 U.S.L.W. 3915. The *Weyerhaeuser* case, however, was subsequently dismissed by the parties on June 14, 1983, 51 U.S.L.W. 3903. The instant case raises the same issues as *Weyerhaeuser* except that the lower court rulings are even more startling since (1) the activities here are merely similar and not consciously parallel, and (2) the activities from which the conspiracy is inferred are not the activities upon which plaintiff bases its damage claims.

This Court should grant certiorari. The issues are of obvious importance: to provide the lower courts and the business community with guidance as to the circumstances under which Section 1 conspiracy can be inferred. This case provides an opportunity to provide clear guidance by this Court on this important issue, and to correct and avoid in the future conflicts among the circuits.

Respectfully submitted,

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83-301

No.

In the Supreme Court
OF THE
United States

October Term, 1983

Alaska Lumber & Pulp Company, Inc.,
an Alaska corporation,
Petitioner,

vs.

Reid Brothers Logging Company,
an Alaska corporation,
Respondent.

Appendix to
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Appendix A

Reid Brothers Logging Company,
an Alaska corporation,
Plaintiff-Appellee,

vs.

Ketchikan Pulp Company, a Washington
corporation, and Alaska Lumber and
Pulp Company, an Alaska corporation,
Defendants-Appellants.

Nos. 81-3444, 81-3448.

United States Court of Appeals,
Ninth Circuit.

Submitted Sept. 9, 1982.

Decided March 1, 1983.

Appeal from the United States District Court for the Western District of Washington.

Before BROWNING, TUTTLE,* and REINHARDT, Circuit Judges.

TUTTLE, Circuit Judge:

The defendants-appellants, Ketchikan Pulp Company ("KPC") and Alaska Lumber and Pulp Company ("ALP") come before this Court alleging errors by the district court in finding a conspiracy between the defendants in violation of §§ 1 and 2 of the Sherman Act. 15 U.S.C.A. §§ 1, 2. The appellants also challenge the district court's award of damages to the plaintiff-appellee, Reid Brothers Logging Company ("RBLC"). After a careful review of the extensive record, we find that the district court's holdings are substantially supported by the evidence.

I. THE CONSPIRACY

A. *Background*

The alleged conspiracy aimed its tentacles at the timberland of the Tongass National Forest in southeast Alaska.[1] These woodlands, like many national forests, may be logged by private enterprises under contract from the United States Forest Service ("USFS"). The areas eligible for such harvesting, known as "sales," are advertised in advance by the USFS. A minimum bid is fixed by the USFS, and sealed bids are submitted. All bids are on the basis of a certain number of dollars per thousand board feet (MBF). Parties submitting qualifying sealed bids commonly engage in oral auctions; the high bidder receives the so-called "stumpage rights" to log sales subject to USFS regulations.

KPC and ALP established operations in Alaska in the 1950's. As part of a program to promote the development of the Alaskan timber industry, the USFS entered into long-term contracts allotting specific logging areas to each defendant for a fifty-year period. This guarantee of a long-term timber supply was necessary to offset the risks of establishing processing facilities such as pulp plants and sawmills in an untested market.[2] It was not anticipated that these allotments would satisfy all of the defendants' needs, and KPC and ALP were expected to supplement their timber supply through the normal bidding process.

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[1] Ninety-seven percent of all woodland in southeast Alaska is within the Tongass National Forest.

[2] USFS policy in the 1950's and 1960's actively promoted the development of the Alaskan timber industry as a means of providing employment. The defendants were each required to establish a pulp processing facility as a condition of their long-term allotment contracts. Another manifestation of this USFS policy was a requirement that all Alaskan timber undergo some basic manufacturing process in a sawmill or pulp plant before export. This regulation, known as the primary manufacture rule, made it necessary for all loggers either to own or operate as a supplier to a processing facility.

The district court found three other product markets in the southeast Alaska logging industry besides the sale of standing timber. First, the sale of logs by independent "purchase loggers" who acquire timber rights at USFS sales and sell the harvested logs to mills for processing. Second, the sale of logging services by "contract loggers" who harvest timber under contract to a party owning the stumpage rights. The final product market is the processing of logs by pulp plants and sawmills.

The district court found a broad conspiracy by the defendants to dominate all segments of the southeast Alaska timber industry. The conspiracy was manifested by the defendants' 1) refusal to compete with each other for timber sales offered by the USFS, 2) exclusion and destruction of independent mills which would compete for the limited standing timber and log supply, and 3) elimination of purchase loggers and control of contract loggers through the payment of artificially low prices for timber.

B. *Section 1 of the Sherman Act*[3]

1. *Introduction*

Certain joint conduct by business entities constitutes a *per se* violation of § 1 of the Sherman Act. This category of conduct includes price-fixing (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940)) and horizontal territorial division (*United States v. Topco Associates*, 405 U.S. 596, 608, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972)). When this type of behavior is proved, a court is blocked from inquiring into the "reasonableness" of the defendants' actions.

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[3] Section 1 of the Sherman Act (15 U.S.C.A. § 1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Absent a showing of a *per se* violation, a court must apply a rule of reason analysis. Under this test, the elements of a cause of action for an unreasonable restraint of trade in violation of § 1 of the Sherman Act are:

(1) An agreement among two or more persons or distinct business entities;

(2) which is intended to harm or unreasonably restrain competition; and

(3) which actually causes injury to competition.

Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 844 (9th Cir.1980); *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 9th Cir.1979), *cert. denied* 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980).

We find that the evidence as a whole establishes the existence of a conspiracy between the defendants and that certain acts committed in furtherance of that conspiracy comprised both *per se* and rule of reason violations of § 1 of the Sherman Act.

2. *The refusal to compete*

The refusal of the defendants to compete for timber sales offered by the USFS or logs marketed by independent loggers was part of a general scheme to reduce the costs of timber acquisition and thereby increase the spread between costs to the defendants and the prices received for end products. This refusal to compete continued from 1959-1975 despite a chronic shortage of timber that persisted throughout that entire period.

The illicit relationship between the defendants dates from the earliest years of their joint presence in Alaska. As early as March 6, 1959, shortly after ALP's establishment of a mill in the Tongass National Forest, A.M. Brooks, KPC's timber manager, sent a letter to Archie Byers, his counterpart at ALP, disclosing information on log prices and log purchase agreements. In that letter, Brooks urged Byers to keep the information "strictly confidential."

By 1969, the defendants had created a geographic border dividing the Tongass National Forest into spheres of influence. In an April 7, 1969, letter to Brooks, George A. Schmidbauer, the general manager of the Crawford Division of Georgia-Pacific Corporation, KPC's parent corporation, wrote that KPC should ". . . bid sales out of [the] K.P.C. area where A.L.P. has dropped out of active bidding."

A 1974 KPC memorandum labeled "CONFIDENTIAL" constitutes irrefutable evidence of a geographical market division. In that memo, D.L. Finney, Brooks' successor at KPC, notes that " . . . it would be most beneficial to ALP and ourselves to realign the operations so that KPC had the West Coast." The document discusses the benefits to each defendant of a geographic redistricting and purposes [sic] an "exchange" of certain areas. The memorandum concludes:

> I cannot stress too hard, my feeling about the beenfits (sic) of towing, administration and log transfers and sorting if we can get the best geographical division between ALP and ourselves. It would also strengthen both of us in a competitive position for any outside interest U.S. Ply or whoever) who tries to compete for sales with us at a later date.

This division of the market, sustained by an uninterrupted pattern of communications up through 1975, resulted in a remarkable record of bidding restraint by the defendants. From 1959-1975, ALP and KPC, the two giants of the southeast Alaska lumber industry, bid against each other only three times out of 143 sales by the USFS.[4]

3. *The elimination and exclusion of competing mills*

The defendants' conspiracy extended beyond the refusal to compete between themselves. The evidence clearly shows a well-orchestrated and successful effort by KPC and ALP to eliminate existing independent mills and prevent the establishment of new operations through control of the timber supply. By frustrating the efforts of potential entrants into the market, the defendants were able to minimize competition and keep stumpage rates and payments to purchase loggers at artificially depressed levels.

The fate of the Alaska Prince mill provides a well-documented example of the defendants' tactics. After failing in his efforts to prevent the Oji Paper Company of

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[4] The defendants' attempts to refute these numbers only lend further support to the district court's findings. The defendants present evidence that they bid against each other five times from 1959-1975. Three of the sales, Shrubby Island, Bear Creek No. 1, and North Trout Creek, were those sales cited by the district court. These sales all occurred in 1970, and this brief flurry of competition between KPC and ALP was found to be the result of a temporary disagreement between the defendants. The fourth allegedly competitive bid, the East Bradfield sale on May 13, 1975, occurred after the filing of the complaint in this action. Finally, at the fifth sale, Douglas Bay and Mitchell Point in 1974, each defendant refused to bid above the USFS minimum and the award of the sale was decided by a coin flip. There is substantial evidence that this particular refusal to bid was an act in furtherance of the conspiracy. In any case, competition between the defendants on five bids over a 16 year period can hardly refute the overwhelming evidence of wrongdoing in this case.

Defendant's allegations that their failure to compete was the result of natural and geographic factors such as the costs of establishing a camp and towing logs must also fall under the weight of evidence. The documentary evidence shows that ALP and KPC participated in a conscious division of the market and that each defendant refrained from bidding on sales in the other's "area."

Japan from constructing the mill, KPC's Brooks informed Alaska Prince and all independent loggers supplying KPC that loggers wishing to supply Alaska Prince must be prepared to immediately repay in cash all indebtedness to KPC. In a May 27, 1969, letter to Schmidbauer, Brooks noted that Alaska Prince was "desperately in need of timber" and that Alaska Prince was "beginning to cause [KPC] trouble among the so-called independent loggers" by offering higher prices for logs. Brooks' letter discussed the upcoming Devil's Club No. 2 sale and suggested that KPC "run [the bidding] up on [Alaska Prince] to the point it will really hurt." Brooks noted, however, that KPC must beware of ". . . the danger of making one bid too many."

Less than a month after this letter, Alaska Prince capitulated. On June 24, Brooks wrote Schmidbauer that Alaska Prince had agreed to cease offering higher prices to loggers if KPC would provide it with a log supply. But when Alaska Prince failed to outbid Ed Head, another independent mill operator, for the Devil's Club No. 2 sale, KPC retaliated by refusing to sell Alaska Prince any logs.

On July 17, 1969, Schmidbauer wrote Dave Murdey of KPC:

> Don Finney [KPC timber manager] has expressed some concern about bidding all sales regardless of the desirability of the sale and the location in the south Tongass.
>
> As I see the situation, we should bid all sales to keep Ed Head, Alaska Prince Corporation, or Fuji out. If we should decide to let them buy timber on the south Tongass we are going to have to live with them from now on and there is not enough timber for that.

In the fall of 1970, unable to acquire a timber supply, Alaska Prince offered its mill to KPC. KPC acquired the mill in 1971. The district court found that at least five other mills suffered Alaska Prince's fate. The evidence also supports the district court's finding that the defendant blocked the establishment of competing mill facilities by using covertly controlled corporations ("fronts") to bid preclusively on USFS timber sales.[5]

4. *Payment of artificially low prices for logs*

Finally, the evidence shows that KPC and ALP conspired to pay artificially low prices to loggers. By calculating payments to loggers on the basis of the loggers' costs rather than the value of the logs, ALP and KPC created a network of "captive" loggers heavily indebted to the defendants.[6] With a drop of the executioner's sword, the de-

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[5] The defendants argue that the district court erred in its finding of predatory bidding since there was no evidence that the high prices paid for standing timber would prevent the defendants from covering their marginal costs on the ultimate sale of the processed timber. This rigid objective test, however, has been rejected by this court as the exclusive means of determining the legality of a particular price or bid, *California Products, Inc. v. IBM Corp.*, 613 F.2d 727, 743 (9th Cir. 1979); a more subjective test has been adopted, designed to avoid penalizing an innocent miscalculation and to assure appropriate sanctions against those parties that can accomplish their evil ends without violating the rigid criteria of the marginal cost test. *William Inglis, et al. v. ITT Continental Baking*, 668 F.2d 1014, 1034 (9th Cir. 1981). Where, as here, there is direct evidence that the defendants aimed to exclude competition in order to enhance their long-term market position, the blind application of a numerical test would only frustrate the intent of the Sherman Act.

[6] We note especially the so-called "Minami Report," a survey of ALP timber operations prepared by Fukuchi Minami, the woods manager of the Oji Paper Company in Japan, a shareholder of ALP's parent company. In his 1972 report, Minami noted:

> Operation at logging areas which produces about 70 percent of the whole logging quantity is made nominally by the hands of contractors, but, substantially, they are the so-called "thoroughly owned contractors" of the company subjected even to the guarantee of profits by the same, as a result of which we cannot expect their business efforts as loggers. Such a situation

fendants could cut off a logger's financing, force the logger out of business, and acquire the company or its assets.

The defendants overstate the impact of government regulation on the logging industry. It is beyond question (as recognized by the district court) that the USFS in the 1960's began to discourage certain types of small logging operations. However, the evidence shows that many loggers, including the plaintiff, had both the resources and the experience to survive and prosper in the changing lumber industry. The fact that RBLC was the only remaining independent purchase logger in southeast Alaska in 1973 was found by the district court to be a direct result of the defendants' conspiracy in restraint of prices.

5. *Conclusion*

The evidence shows that the defendants engaged in unlawful anticompetitive conduct pursuant to at least a tacit understanding that each defendant would behave in a particular manner. This finding is supported by both direct and circumstantial evidence. We find that this unlawful agreement constituted a restraint on interstate and foreign commerce in violation of § 1 of the Sherman Act.[7]

> has arisen because the contract price has been and is inappropriate and the deficit owing to this has been covered with growing advance money and, to make matters worse, new contracts for the following year have been made with rent not completely collected. So, we cannot even grasp the ability of the loggers correctly.

[7] The defendants' challenges to the district court's conclusion that a § 1 conspiracy existed are totally without merit. The defendants' attempts to isolate and attack particular portions of the district court's opinion not only ignore the weight of the evidence, but display an apparent inability to interpret certain portions of the district court order. For example, the defendant ALP alleges in its brief that the finding of the § 1 violation was ". . . not based upon any direct evidence of agreement but on an inference of agreement from circumstantial evidence and what the court described as 'consciously interdependent action.' " Yet, that portion of the dis-

C. *Section 2 of the Sherman Act*[5]

The evidence supports the finding of the district court that the defendants violated § 2 of the Sherman Act. Monopoly power is the power to control prices or exclude competition. *United States v. Grinnell Corp.*, 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956); and *Greyhound Computer Corp. v. International Business Machines*, 559 F.2d 488, 496 (9th Cir. 1977), *cert. denied* 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978). An illegal monopolization under § 2 consists of: 1) the possession of monopoly power in the relevant market, 2) the unlawful acquisition or maintenance of that power, and 3) causal antitrust injury. *Grinnell Corp.*, 384 U.S. at 570-71, 86 S.Ct. at 1703-04; *Greyhound Computer*, 559 F.2d at 492; *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1218 (9th Cir. 1977).

The district court correctly defined the relevant geographic and product markets and found that the defendants combined to possess over a 90 percent share in those markets. The above-cited evidence shows the existence of a conspiracy based on an intent to monopolize and the occurence of several overt acts in furtherance of that conspiracy.

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trict court opinion cited by the defendant reads, "In carrying out their combination and conspiracy, KCP and ALP have operated *both by explicit communications with each other and by consciously interdependent action.*" (Emphasis added). This court does not find it necessary to refute each of the defendant's challenges on an individual basis.

[5] Section 2 of the Sherman Act (15 U.S.C.A. § 2) reads:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars, or by both said punishments in the discretion of the court.

II. THE DAMAGES

A. *Introduction*

The defendants also challenge the district court's finding that the plaintiff, RBLC, was injured as the result of the defendants' unlawful conduct and thus entitled to a treble damages award under § 4 of the Clayton Act, 15 U.S.C.A. §15.[9] To recover under this section, the plaintiff must "establish with some reasonable probability the existence of some causal connection between defendant's wrongful action and some loss of anticipated revenue." *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 392 (9th Cir. 1957); *Inglis,* 668 F.2d at 1051.

The district court's findings of damage to the plaintiff may only be overturned if "clearly erroneous." Fed.R. Civ.P. 52(a). It has long been held that ". . . a finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co., et al,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *United States v. Missouri River Breaks Hunt Club,* 641 F.2d 689, 694 (9th Cir.1981).

Moreover, the clearly erroneous standard as applied in the present case is tempered by the repeated holdings of the Supreme Court that a lightened burden of proof is imposed on a plaintiff seeking to prove antitrust damages once violations of the law have been established. ***Zenith***

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[9] 15 U.S.C.A. § 15 provides in relevant part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969)[10] *Eastman Kodak Co. v. Southern Materials, Inc.*, 273 U.S. 359, 377-79, 47 S.Ct. 400, 404-05, 71 L.Ed. 684 (1927); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 811 (9th Cir.1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977).

Despite the long-standing nature of the conspiracy and RBLC's active involvement in the relevant market at all times pertaining thereto, RBLC's claim for damages on this appeal is limited to its loss of revenue at a single logging site, Muddy River No. 3.[11] The damages awarded by the district court rest on the notion that RBLC, in an unrestrained market, could have operated Muddy River No. 3 as an independent purchase logger from 1972-1974. After an exhaustive review of the voluminous record, we find adequate support for the district court's findings of fact and therefore reject the contentions of the defendants that these findings are clearly erroneous.

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[10] The Court in *Zenith Radio* wrote:

> Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded by a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damages issues in these cases are rarely susceptible of a kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of a more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damages to the plaintiffs." (Citations omitted).

395 U.S. at 123, 89 S.Ct. at 1576.

[11] In the trial court, the plaintiff also sought damages for losses suffered at the Kah Sheets-Mitchell Point logging sites in 1970. RBLC does not appeal from the court's finding that RBLC could not have operated Kah Sheets-Mitchell Point at a profit in an unrestrained market.

B. *The Undisputed Facts*

In determining whether RBLC was injured by the defendants' conspiracy, it is important to bear in mind the chronology of events at the Muddy River site. RBLC purchased the site at a USFS auction in June 1972. Shortly thereafter, RBLC signed with KPC to deliver the timber from that site to KPC at $64/MBF.[12] The agreement contained no provision for periodic renegotiation of the contract price. It was anticipated that RBLC would complete its operations at the site within three years.

Throughout 1972, RBLC faced a severe shortage of capital and thus found it necessary to secure financing for "startup costs" at the Muddy River site. Though the district court makes no explicit findings on the amount of funds needed, the evidence appears undisputed that RBLC required at least $205,000 to finance logging equipment and roadbuilding at Muddy River No. 3 and to pay off previous debtors whose goodwill was necessary for the continuance of operations at Muddy River No. 3.

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[12] The parties recognize (and the district court found) that the effective price offered by KPC for the Muddy River No. 3 logs was in fact somewhat higher than $64/MBF since KPC was to bear additional costs such as towing, rafting, etc. The parties agree that these costs were at least $9.81/MBF which, when added to the contract price, yields an effective offer of $73.81/MBF. The parties disagree whether the standard 14 percent allowance for profit and risk authorized by the USFS should be attributed to KPC or RBLC, but, as discussed *infra*, this dispute is largely irrelevant since the effective price in either case exceeds the district court's finding of the unrestrained market price in 1972 for the Muddy River No. 3 logs.

In order to obtain this financing, RBLC executed a "third party agreement" with KPC whereby its ownership of the Muddy River No. 3 stumpage rights was transferred to KPC. After this transaction, RBLC became a contract logger and operated Muddy River in such capacity until September 10, 1973 when it ceased operations at the site.

In 1973 and 1974, there was a sharp rise in the prices of end products exported from Alaska sawmills and pulp plants. In a competitive market, a certain portion of such a price rise would be "passed through" to the owners of the stumpage rights. Therefore, if RBLC had continued to operate Muddy River No. 3 as a purchase logger from 1972-74, it would have reaped substantial profits.

C. *The District Court Findings*

1. *The multi-year, non-negotiable contract*

The finding of the district court that KPC unlawfully imposed a multi-year, nonnegotiable contract on RBLC for the sale of the Muddy River logs is substantially supported by the evidence. By the spring of 1972, competition for logs in southeast Alaska had been effectively eliminated by the defendants' conspiracy. Competing mills (including Alaska Prince, RBLC's principal log buyer in the 1960's and early 1970's) had been either run out of business or enslaved by indebtedness to the point of becoming "captive mills." By the time RBLC purchased the Muddy River No. 3 sale, its choice of customers for its logs was limited to mills controlled directly or indirectly by the defendants.

Furthermore, the evidence also supports the critical finding of the district court that contractual log prices between a purchase logger and a log buyer would have been renegotiated at least annually in an unrestrained market.

Without periodic renegotiation, fluctuations in the market price for logs and their end products would not be "passed through" to the owner of the timber rights. The evidence shows that in the competitive Pacific Northwest timber market, prices are renegotiated on a periodic basis ranging from daily to annually. It was also shown that when the defendants in the present case acted as sellers rather than buyers of logs, prices were renegotiated on at least an annual basis.

Facing these restrictive market conditions, RBLC had no incentive to postpone the execution of the sales contract in hopes of obtaining better terms of sale. Its acceptance of the best terms it could obtain in a restrained market was fully justified.

2. *RBLC's ability to obtain financing*

Once it is determined that KPC unlawfully imposed a flat rate, multi-year logging contract on RBLC, the vital question becomes whether RBLC could have obtained financing to start up the Muddy River No. 3 sale as a purchase logger in an unrestrained market. If RBLC could not have obtained this financing, it would have been forced either to transfer the stumpage rights to a third party and operate as a contract logger, or to delay the commencement of operations for another season in the hope that a rise in prices would make financing feasible; either contingency would require a reconsideration of the district court's damage findings.

The evidence, though very close, shows that RBLC could have obtained sufficient financing to operate as a purchase logger at Muddy River No. 3. The district court found that RBLC could have obtained financing from a combination of the personal assets of Glenn and Martha Reid, the proprietors of RBLC, and $100,000 that would have been loaned from the Hammer and Wikan Retail Store.

There can be no question but that the Reids' personal assets were available to RBLC as collateral for loans. The history of the business, as with many proprietorships, shows that the Reids treated the debts of the business as their own. We especially note the personal sacrifices made by the Reids to pay off RBLC's debts following the termination of operations at Muddy River.

An accountant testifying on behalf of RBLC established that the net equity of the Reids and RBLC together in March, 1972 was $216,000. Some evidence was presented by the defendants that these assets were already encumbered and could not have served as the basis for further loans, but this testimony was inconclusive.

Art Hammer testified on behalf of Hammer and Wikan Retail Store. Though Hammer testified that he, his father, and Mr. Andrew Wikan would have been willing to make personal loans to RBLC, the district court discounted this testimony and focused on the ability and willingness of the Retail Store to provide financing. Though the defendants attack the competence of Art Hammer to testify regarding the Retail Store's lending policies, the evidence shows that in his position as store manager, shareholder, and board member, Hammer exercised an important voice in such decisions.

Hammer's testimony reflected the enormous respect accorded the Reids for their business acumen and personal integrity. Hammer repeatedly stated that the Retail Store would have loaned the Reids large amounts of money on a mere assertion by Glenn Reid that he was receiving a reasonable price for his logs. Hammer's testimony that he, his father and Wikan would not have requested a financing statement is especially important since RBLC's financial condition in 1972, even in the hypothetical unrestrained market, would have given an accountant cause for alarm.[13]

The defendants base their argument that RBLC would have been unable to secure sufficient financing to operate Muddy River No. 3 as a purchase logger on the formula derived by the district court to calculate the amount of damages suffered by RBLC at Muddy River. Applying that formula, the district court found that RBLC's costs at the Muddy River site in an unrestrained market in 1972 would have equalled $71.03/MBF. The formula also shows that RBLCs' revenues in an unrestrained market in 1972 would have equalled $70.03/MBF.

The defendants compare these figures to the effective price of at least $73.81/MBF[14] that KPC offered RBLC for its entire Muddy River production and assert (1) that RBLC could not have obtained financing in an unrestrained market when its costs ($71.03) were greater than its revenues ($70.03), and (2) if RBLC was in fact unable to obtain financing from a source other than KPC in the actual 1972 market, it certainly could not have obtained financing in the hypothetical unrestrained market where the market value of its logs ($70.03) was less than the price actually offered by KPC ($73.81).

The evidence demonstrates that these arguments rely on an inaccurate vision of the operation of a competitive timber market. In an unrestrained market, numerous independent mills bid on timber offered by a purchase logger from a particular sale. Though these bids may on occasion not be high enough to provide a reasonable profit for an independent logger, the evidence shows that the highest of such bids is routinely accepted since *periodic renegotiation* based on end product prices and the logger's cost assures that an independent logger will obtain the most reasonable price the market can offer within any given time period.

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[13] These dire financial straits of RBLC were primarily the result of the substantial losses suffered by it at the Mitchell Point-Kah Sheets sales in 1970. As previously mentioned, these losses were attributed by the district court to poor logging conditions at the site and were in no way related to the defendants' conduct.

[14] *See* footnote 12, *supra*.

The evidence indisputably shows that the financing of startup costs in an unrestrained market typically comes from the mill that has contracted to purchase the logs from a particular site. Given (1) the chronic shortage of logs that persisted in southeast Alaska, (2) a purchasing mill's anticipation of a profit, and (3) the security provided by the Reids' personal assets and the logs themselves, there can be little question that RBLC could have obtained financing from a mill operator in 1972.[15]

The defendants' arguments improperly separate RBLC's sale of the Muddy River No. 3 logs from the securing of financing for the harvesting of those logs. Their proffered analysis, which assumes the existence of RBLC's three-year, non-negotiable contract with KPC even in an unrestrained market, overlooks that RBLC's most important means of obtaining financing is the collateral provided by the logs themselves. To bind a logging company's production to one party and then speculate how it could obtain financing from another postulates anything but an unrestrained market situation; the defendants seek to rely on the district court's unrestrained market price figures while maintaining the most favorable elements of the market they conspired to create.

Nowhere in its brief do the defendants assert that RBLC could not have found a purchaser for its logs in an unrestrained market. Nor does the evidence indicate that a sawmill or pulp plant facing a chronic shortage of logs in an unrestrained market would not make financing available in anticipation of the profit which induced the mill to purchase the logs initially. The logger and the mill may often suffer substantial losses as a result of a falling market or conditions at the logging site less favorable than anticipated; in other cases, however, market prices may soar or costs may be less than anticipated, and both the mill and the logger will reap an unexpected windfall. Unfortunately for the defendants, it was just such a bonanza that their illegal actions prevented RBLC from enjoying in the rapidly escalating market of 1973-1974.

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[15] We again take note of the outstanding reputation enjoyed by the Reids. Hammer's testimony established the existence of an outside party which would have loaned up to $100,000 to RBLC on Glenn Reid's word alone.

In sum, the evidence adequately supports the following findings of the district court: 1) in a competitive timber market, prices for the sale of logs from purchase loggers to mills are renegotiated on at least an annual basis; 2) RBLC's agreement to sell the entire production of the Muddy River sale to KPC at a fixed, nonnegotiable price was a product of the conspiracy between ALP and KPC to eliminate competition in the Southeast Alaska timber industry; 3) the nonnegotiable price imposed on KPC by RBLC was far below the true value of the Muddy River logs in an unrestrained market from 1972-74; 4) in an unrestrained market, RBLC could and would have obtained the financing necessary to operate Muddy River No. 3 as a purchase logger from 1972-74; 5) in an unrestrained market where contract prices are periodically renegotiated, a certain portion of a rise in the price of end products produced from harvested logs would be passed through to the owner of the stumpage rights; the absence of any provision for renegotiation in the contract between RBLC and KPC establishes the fact of injury or damages; and 6) the defendents' actions, therefore, deprived RBLC of the substantial profits it could have acquired in the rising market of 1973-74. This proof establishes the amount of damages.

Under these circumstances, we conclude that the trial court correctly refused to let KPC and ALP escape liability for RBLC's substantial losses simply because the noncompetitive, nonnegotiable price KPC imposed upon the plaintiff fortuitously hovered near the unrestrained market price calculated by the district court for 1972, the first year of the contract.[16]

3. *The third party agreement and the breach of contract*

The evidence supports the finding of the district court that RBLC would not have signed away its stumpage rights and agreed to operate Muddy River No. 3 as a contract logger in an unrestrained market. As discussed *supra*, RBLC could have obtained financing without resorting to this drastic measure. The district court also properly found that KPC wrongfully terminated its contract with RBLC in September, 1973.

C. *Conclusion*

The other findings of the district court necessary to the finding of damages are also substantially supported by the evidence. The record shows that RBLC could have successfully operated the Muddy River No. 3 site as a purchase logger in an unrestrained market. We thus affirm the district court's award of $1,489,881 in treble damages.

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[16] As previously noted, prices paid by the defendants for logs were established on the basis of the loggers' costs, not the true market value of the logs. Since loggers' costs are not directly related to the market value of the harvested logs, any similarity between the price offered by the defendants and the unrestrained market price at any given time is largely coincidental.

III. OTHER ISSUES

A. *Effectiveness of ALP Jury Demand*

The appellant ALP asserts that the district court improperly allowed RBLC to withdraw its jury request over the objection of ALP inviolation of Rules 38(d)[17] and 39(a)[18] of the Federal Rules of Civil Procedure, 28 U.S.C.A. ALP seeks a remand to the district court for a trial by jury. We find that the consistent efforts of ALP to defeat RBLC's jury request demonstrated ALP's failure to rely on this request and constituted a waiver by ALP of its rights under the Rules.

RBLC and the plaintiffs in four companion cases filed jury demands and motions to consolidate the cases for trial in 1975. On July 28, 1978, the defendants ALP and KPC appeared before district court Judge Sharp and filed a motion to strike the jury demands. The motion was based on the complexity of the issues presented.

Three months later, following Judge Sharp's August 30 order that the five companion cases be tried separately, the defendants renewed their motion that the RBLC case be tried without a jury.[19] Judge Sharp denied the motion and stated his intention to try the RBLC case first.

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[17] Rule 38(d) reads:

> Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

[18] Rule 39(a) reads:

> By jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

In May, 1980, the cases were assigned to Judge Rothstein because of Judge Sharp's illness. At Judge Rothstein's request, RBLC waived its jury demand in order to make possible an earlier trial date. KPC consented to the waiver, but ALP, in a letter to the court dated June 6, 1980, refused to consent and demanded that the case be tried to a jury. RBLC moved to strike this demand, and on July 7, 1980, the district court granted the motion. ALP now comes before this court and asserts that its refusal to consent to the withdrawal of RBLC's jury demand in the manner required by Rule 39(a) entitles it to a trial by jury under Rule 38(d).

Rule 38(d) reads, in part, "A demand for trial by jury, made as herein provided, may not be withdrawn without the consent of the parties."[20] It is widely recognized that this provision is designed to allow parties to rely upon the jury demands of other parties to the same case. *DePinto v. Provident Securities Life Insurance Co.*, 323 F.2d 826, 832 (9th Cir.1963); *Calnetics Corp. v. Volkswagen of America*, 532 F.2d 674, 690 (9th Cir.1976), *cert. denied* 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976); *Rosen v. Dick*, 639 F.2d 82, 87 (2d Cir.1980); *State Mutual Life v. Arthur Andersen & Co.*, 581 F.2d 1045, 1050 (2d Cir.1978); and 5 *Moore's Federal Practice*, ¶ 28.45 at 38-391 to 393(2) (2d ed. 1980). As a practical matter, Rule 38(d) prevents a party from withdrawing its request for a jury trial subsequent to the expiration of the period for a timely demand by the other parties thereby depriving those parties of the right to a trial by jury.[21] In the present case, the persistent efforts of ALP to defeat RBLC's jury request demonstrate that ALP was not relying on that request. Therefore, ALP waived its right to rely on the protections of Rules 38(d) and 39(a).

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[19] In the district court, ALP alleged that both the challenges to RBLC's jury request were made prior to the district court's ruling that the five companion cases be tried separately. The trial court rejected this contention, and ALP does not raise it on this appeal.

[20] Rule 39(a), of course, sets forth the manner in which this consent may be granted.

Although ALP contends that a literal reading of Rule 38(d) compels a retrial, we decline to apply the rule in such a formalistic manner. Rule 1 of the Federal Rules of Civil Procedure advises that the Rules ". . . be construed to secure the just, speedy, and inexpensive determination of every action." As recognized by this Court in *Builders Corp. of America v. United States,* 259 F.2d 766 (9th Cir.1958), "The spirit of the Rules [of Civil Procedure] is that technical requirements are abolished and judgments be founded on facts and not on formalistic defects." *See also United Press Ass'n v. Charles,* 245 F.2d 21, 26 (9th Cir.1957), *cert. denied* 354 U.S. 925, 77 S.Ct. 1378, 1 L.Ed.2d 1435 (1957). Given these guiding principles, we conclude that the district court properly looked beyond the facial language and applied the Rules in a manner consistent with their underlying purpose.[22]

Palmer v. United States, 652 F.2d 893 (9th Cir.1981), cited by ALP, is consistent with this holding. In that case, a defendant made a timely request for a jury trial. The trial court overlooked or disregarded the demand, but the party remained silent when the case commenced without a jury. On appeal, this court recognized, "Conduct of the parties which evinces consent and appears in the record is sufficient to constitute a proper withdrawal and waiver (citations omitted)." But the court held that mere silence was insufficient to constitute a withdrawal of a jury trial demand. In the present case, the conduct of ALP fills the void left by the silence in *Palmer* and constitutes an affirmative withdrawal of any reliance on RBLC's jury demand. In these circumstances, a literal reading of Rule 38(d) would act as an instrument of delay and frustrate the purposes of the Federal Rules of Civil Procedure.

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[21] Fed.R.Civ.P. 38(b) provides that a demand for trial by jury on particular issues " . . . must be made not later than 10 days after the service of the last pleading directed to such issues." It is not contended that ALP made a timely demand for a jury trial under Rule 38(b); the sole issue is whether ALP was entitled under Rule 38(a) to block the withdrawal of RBLC's jury request.

[22] For an extensive discussion of the liberal interpretation of the Federal Rules of Civil Procedure, *see 2 Moore's Federal Practice,* ¶ 1.13[1] at 281-287 (2d ed. 1980).

We are fully aware of this court's admonition that every reasonable presumption be indulged against the waiver of a trial by jury. *Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir.1981). But where, as here, the appellant unambiguously and determinedly acted to defeat RBLC's jury request, the only reasonable conclusion is that the appellant was not relying on that request and thus was not entitled to invoke the protection of Rule 38(d).

B. *Statute of Limitations*

The defendants invoke the four year statute of limitations of 15 U.S.C.A. § 15b[23] and argue that the district court improperly premised liability on events occurring before March 13, 1971, four years prior to the filing of the complaint. The defendants point specifically to the district court's findings of preclusive bidding in the mid-1960's and the central role in the conspiracy of A.M. Brooks, KPC's timber manager, who retired in 1969.

It is well-settled that a plaintiff may introduce background evidence to establish a continuing course of conduct or to cast light on the character of an existing conspiracy. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 709-10, 82 S.Ct. 1404, 1415-16, 8 L.Ed.2d 777 (1952); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 n. 3, 85 S.Ct. 1585, 1593 n. 3, 14 L.Ed.2d 626 (1965); *Independent Taxi Cab Operators Ass'n v. Yellow Cab Co.*, 278 F.Supp. 979, 986 (N.D.Cal. 1968). Furthermore, a plaintiff is entitled to a full recovery of damages suffered during the limitations period ". . . even though some undetermined portion of those damages was the proximate result of conduct occurring more than four years prior to the filing of the [complaint]." *Zenith Radio*, 401 U.S. 321, at 333, 91 S.Ct. 795 at 803, 28 L.Ed.2d 777.

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[23] 15 U.S.C.A. § 15b provides in relevant part:

> Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued.

In the case before us, the background evidence is necessary to establish the defendants' role in the limited market faced by RBLC in 1972; moreover, the evidence clearly shows the continuing existence of the conspiracy through at least 1975. The contract imposed on the plaintiff by KPC at Muddy River No. 3, an overt act in furtherance of the conspiracy, could only have been achieved in this atmosphere of cooperation between the defendants. The mere fact that the conspiracy began in 1959 will not bar recovery given the substantial evidence of sustained illegal activity during the limitations period.

C. *ALP's Liability*

Defendant ALP argues that it should be absolved from liability because it was in no way responsible for the events which resulted in RBLC's heavy losses at Muddy River No. 3. This contention rests on the flawed logic that RBLC's damages were solely a product of the actions of KPC at Muddy River.

An injured plaintiff seeking damages is not required to show privity or any manner of direct dealing with the defendant. *Mandeville Islands Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S.Ct. 996, 92 L.Ed.

1328 (1948); *South Carolina Counsel of Milk Producers, Inc. v. Newton,* 360 F.2d 414, 417 (4th Cir. 1966). A party that participates in a conspiracy "must . . . share responsibility for the resulting damage, including that occasioned by activities in which it did not directly participate, or from which it did not directly benefit." *Twentieth-Century Fox Film Corp. v. Goldwin,* 328 F.2d 190, 212 (9th Cir. 1964); *see also Karseal Corp. v. Richfield Oil Corp.,* 221 F.2d 358, 361 (9th Cir. 1965).

In and of itself, KPC's behavior at Muddy River No. 3 did not create a cause of action for RBLC under § 4 of the Clayton Act. 15 U.S.C.A. § 15. The harm suffered by RBLC was actionable because of its causal connection to the conspiracy between the defendants. KPC's actions were not only a manifestation of the conspiracy, but were made possible only by the prior destruction of competition and the continuing cooperation between KPC and ALP. In these circumstances, ALP must share the blame for the damages to RBLC.

D. *The Admissibility of Exhibit 692*

The defendants challenge the district court's admission of Exhibit 692, the so-called "Minami Report." The defendants assert that the report constituted inadmissible hearsay and provided the sole support for the district court's finding that the defendants purposefully set log prices at levels below market value. The record, however, discloses the following facts upon which the district court could have found that the report was an admission by a party-opponent under Fed.R.Evid. 801(d)(2)(C), 28 U.S.C.A.[24]

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[24] Rule 801(d)(2)(C) provides in part:

(d) A statement is not hearsay if—

(2) The statement is offered against a party and is

(C) A statement by a person authorized by him to make a statement concerning the subject.

The report, entitled "Survey Report on ALP Woods Operation" was prepared by a Mr. Minami, an employee of the Oji Paper Company of Japan. The Oji Paper Company is a shareholder of ALP's parent company, Alaska Pulp Company ("APC"). This survey was prepared at the request of Mr. Nishizawa, ALP's chairman of the board. Mr. Minami spent 41 days in Alaska accumulating research for his report. During this time, he was given free access to all of ALP's books and records, and he was accompanied by ALP employees on visits to ALP logging camps. The final report was translated into English at APC headquarters in Japan, and Mr. Minami presented the report to a meeting of the ALP Log Committee, a meeting attended by numerous ALP executives. Following the meeting, a copy of the report was circulated to ALP officers and managers. Given these circumstances, there can be little question that Minami was "authorized" by ALP to make statements regarding the entire scope of ALP's woods operations, including the price structure for the purchase of logs. Therefore, we find that the district court properly allowed the admission of Exhibit 692 under Fed.R.Evid. Rule 801(d)(2)(C).[25]

E. *Other Evidentiary Challenges*

The defendants challenge several other evidentiary rulings of the district court. A ruling by a trial judge on the admissibility of evidence will be overturned only if there was a clear abuse of discretion. *Kaplan v. International*

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[25] The Notes of the Advisory Committee on the Rules of Evidence make it clear that the common law requirement of some jurisdictions that a person authorized to speak for a principal must make a statement to a third person before that statement can be introduced as an admission has been legislatively overruled by Rule 801(d)(2)(C). *See Kingsley v. Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1144 (5th Cir. 1977); *Zenith Radio Corp. v. Matsushita Electric Industrial Company, Ltd.*, 505 F.Supp. 1190, 1246 (E.D.Pa. 1980).

Alliance of Theatrical, etc., 525 F.2d 1354, 1362 (9th Cir. 1975); *Pierce Packing Co. v. John Morrell & Co.*, 633 F.2d 1362 (9th Cir.1980). We find that the trial court's actions survive the application of this test.

In any event, the court's rulings constitute harmless error under Fed. R.Civ.P.61,[26] 28 U.S.C.A. There is no showing that the trial court gave determinative weight to the challenged evidence which was admitted at trial, or that excluded evidence would have altered the district court's findings. The challenged evidence, pertaining to the existence of a conspiracy under Sections 1 and 2 of the Sherman Act, is but a drop in the bucket in light of the substantial evidence of wrongdoing in this case. In this context, there can be no showing that the court's actions affected ". . . the substantial rights of the parties." Fed.R.Civ.P. 61. *See Department of Water & Power of City of Los Angeles v. Okonite-Callender Cable Co., Inc.*, 181 F.2d 375, 382 (9th Cir.1950); *Purer & Co. v. Aktiebolaget Addo*, 410 F.2d 871 (9th Cir.1969).

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[26] Federal Rules of Civil Procedure Rule 61 provides:

> No error in either admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or admitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

IV. CONCLUSION

The district court's findings of the existence of a conspiracy in violation of §§ 1 and 2 of the Sherman Act and causal antitrust injury to the plaintiff are substantially supported by the evidence. The trial court did not abuse its discretion in any of its procedural and evidentiary rulings.

The judgment of the trial court is AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

I respectfully dissent from Section III A of the majority's opinion holding that the defendants forfeited their right to a jury trial. I do not believe that Rules 38 and 39 of the Federal Rules of Civil Procedure contemplate that one party to the litigation shall have an exclusive continuing option to determine whether a trial shall be by court or jury merely because the other side vigorously contended at one point that a court trial was mandatory. In my opinion, far more is required before we can declare that a party has waived its right to a jury trial. To create an implied waiver from defendants' conduct here denigrates the principle that every reasonable presumption be indulged against the waiver of a right to trial by jury. *Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir. 1981).

One problem with the majority's conclusion is that it ignores the practicalities of litigation. Whether or not a party desires a jury trial may well depend on what the specific alternative is. Judges are not fungible commodities. One side may prefer a trial before a particular judge to a trial by jury. For the very same reasons, the other side may not. When conditions change and a new judge is assigned to preside over the trial the views of both sides may change, as they did here. A party that initially insisted that a jury trial was essential to the very survival of our system of justice may suddenly decide that a trial before a judge is by far the wiser course. The opposing party, having previously proclaimed vigorously that there was no right to a jury trial, may just as suddenly conclude that a trial by jury is a precious heritage which they have a constitutional right to invoke. There is nothing mystifying or surprising about such tactical changes by the parties. However, the underlying principle that overrides what is good or bad for a particular side at a particular time is the right to trial by jury. That right was just as important when defendants asserted it shortly before trial as it was when plaintiff successfully invoked it at the commencement of the proceedings.

Once a jury trial is demanded by one party in a timely manner, all parties have a continuing right to insist on a jury trial and to object to any attempted waiver by the party that originally invoked the right; the parties are also free to change their respective positions regarding a jury trial, as the two sides did here. It is clear to me that defendants had no intention of waiving all of their rights under Rule 38(d) and 39(a), and I do not believe that asserting a position that plaintiff was not entitled to a jury trial is conduct that should be held to constitute an unintended waiver.

Merely because defendants argued at an early stage in the litigation that plaintiff did not have a right to a jury trial does not in any way suggest that, if the court concluded they were wrong, defendants would be willing to waive their continuing right to object to a subsequent change in position by plaintiff. Certainly, there would be no reason for defendants to give up their right to change their own position if circumstances changed. From defendants' standpoint, the implied waiver suggested by the majority served no purpose other than to put the plaintiff in the position the majority finds it was in—having exclusive control over the decision whether the trial would be by jury or by court, with the right to make that final unilateral decision based on the circumstances that existed just prior to the time of trial. I see no reason why objecting to an opponent's jury demand, whatever the basis for the objection, should entail such a consequence.

The majority's assertion that defendants were not relying on plaintiff's jury demand since they initially opposed it seems to me to be only partially correct. It is true that, as the majority says, that [sic] defendants did not initially rely on that demand in order to secure a jury trial. Defendants did, however, rely from the outset on the Rules that provide that once a demand is made, it cannot be withdrawn unilaterally. That reliance was, in my opinion, justified.

I do not believe that this is a case involving "technical requirements" or "formalistic defects," nor that the admonition of Rule 1 regarding "speedy and inexpensive determination of every action" provides a justification for dispensing with the right to trial by jury. While I understand the majority's reluctance to undo the results of a substantial investment of judicial time and resources, and to reward the defendants for their belated conversion to a belief in the sanctity of trial by jury, I believe that defendants were entitled under the Rules to insist on a jury trial, that they did not waive their right to trial by jury, and that a court verdict cannot stand.

Appendix B

United States District Court
Western District of Washington
at Seattle

No. C75-165SR

Reid Brothers Logging Company,
an Alaska corporation,
Plaintiff,

vs.

Ketchikan Pulp Company, a
Washington corporation; and
Alaska Lumber and Pulp Company,
an Alaska corporation,
Defendants.

Findings of Fact and Conclusions of Law

[Filed June 8, 1981]

THIS ACTION came on for trial before the Court, sitting without a jury, on August 4, 1980. All parties appeared by their counsel of record. The Court, having considered all of the evidence herein and the briefs submitted by the parties, and being fully advised, now makes and enters the following findings of fact and conclusions of law under the provisions of Rule 52(a), Federal Rules of Civil Procedure.

FINDINGS OF FACT

I. ALL ADMITTED FACTS FROM THE PRETRIAL ORDER IN THIS CASE ARE HEREBY INCORPORATED BY REFERENCE

II. FACTS RELATING TO JURISDICTION

A. *Subject Matter Jurisdiction; Venue.*

This is a civil action brought under the antitrust laws of the United States. Each defendant resides or is found or has an agent in this District.

B. *Interstate Commerce.*

The timber industry in Southeast Alaska, as engaged in by all three parties to this trial, involved a substantial and continuous flow of goods and payments in interstate commerce, including the interstate purchase and shipment of equipment and supplies for logging and milling operations, the interstate travel of employees, suppliers, and service personnel, the sale each year in interstate and foreign commerce of many millions of dollars' worth of cants, pulp, and other wood products, and the regular use of interstate and foreign carriers. Interstate commerce has been restrained and affected by the defendants' conduct, acts, and practices in violation of the Sherman Act, described *infra* in these findings.

III. IDENTIFICATION OF THE PARTIES

A. *Plaintiff Reid Brothers Logging Company.*

The plaintiff, Reid Brothers Logging Company ("Reid Brothers"), is an Alaska corporation. The company was formed in 1946 by the Reid family and the owners for most of the period until 1968 were Glenn and Martha Reid, husband and wife, and Alex and Mary Reid, husband and wife. From and after 1968, the sole owners were Glenn and Martha Reid.

B. *Defendant Ketchikan Pulp Company.*

Defendant Ketchikan Pulp Company ("KPC") is a Washington corporation. It was originally formed as a joint subsidiary of American Viscose Corporation, Inc. and Puget Sound Pulp and Timber Co., Inc. From 1963 to 1973 it was a joint subsidiary of Georgia-Pacific Company (GP) and FMC Corporation. From 1973 through March, 1975, in which month this action was commenced, KPC was a joint subsidiary of Louisiana Pacific Corporation and FMC Corporation.

C. *Defendant Alaska Lumber and Pulp Company.*

Defendant Alaska Lumber and Pulp Company ("ALP") is an Alaska corporation. It was formed as a subsidiary of Alaska Pulp Company, Ltd. ("APC"), a Japanese-owned corporation, the shares of which were and are held by numerous companies engaged in rayon manufacture, pulp and paper manufacture, banking, trading, and other commercial and industrial activities.

IV. DESCRIPTION OF THE INDUSTRY

1. Southeast Alaska is a narrow strip of mainland and an archipelago of islands stretching in a southeasterly direction from the main body of Alaska. From south to north its principal towns, none of which is connected to another by road, are Ketchikan, Wrangell, Petersburg, Sitka, and Juneau, the capital of Alaska. The Yakutat area, which lies to the northwest of Juneau, is usually considered a part of Southeast Alaska.

2. From 1959 through March of 1975, approximately 97% of the commercial timber stands in Southeast Alaska lay within the Tongass National Forest. The principal species of trees are Western Hemlock, Sitka Spruce, and cedar, the latter consisting of Alaska Yellow Cedar and Western Red Cedar. Scattered stands of cottonwood are also found in river bottoms throughout the region.

3. Both hemlock and spruce were acceptable for making pulp. Although a higher proportion of low grade logs were generally run through pulp mills rather than sawmills, both species were also usable for sawmilling. In Southeast Alaska all grades of logs were at times used for pulp; the higher grades were used by sawmills. Spruce, however, with a high strength to weight ratio, had particular value as a lumber product. Cedar was exported in round log form and was also cut into lumber.

4. The following mills played an important role in the facts of this case:

(a) The KPC pulp mill was situated in Ward Cove, just north of Ketchikan. In 1973, KPC constructed a sawmill at the same location.

(b) Ketchikan Spruce Mill (KSM) was located in Ketchikan. This mill was acquired by KPC through its parent, Georgia-Pacific in 1968.

(c) To the northwest of Ketchikan, in Klawock, was Alaska Timber Corporation (ATC). Edward Head began the construction of this sawmill, but it was acquired by KPC, and leased back to Mr. Head. During some of the years in question, Mr. Head managed this mill and had a log supply and marketing agreement with KPC.

(d) To the north, two sawmills were located in Wrangell: Alaska Wood Products (AWP), and Wrangell Lumber Company (WLC). The WLC mill had been established before World War II. In 1954 ALP leased, renovated and began operating the mill. The AWP mill was constructed by Pacific Northern Timber Corporation (PNT) in the mid-60's. In 1968 it was acquired by ALP. Following the acquisition, WLC milled principally spruce, and AWP functioned as a hemlock milling facility.

(e) Mitkof Lumber Company (MLC), a small sawmill, was located in Petersburg. Beginning in the mid-60's, MLC formed joint ventures with WLC to bid on timber sales. MLC later entered into a formal log supply and marketing agreement with WLC.

(f) The ALP pulp mill was situated in Sitka.

(g) Farther north, in the town of Haines, two more sawmills were located: Schnabel Lumber Company (SLC) and Alaska Forest Products (AFP). SLC operated pursuant to complex loan, supply and marketing agreements with

ALP. AFP's sawmill operated intermittently for a period of years and then went out of business.

(h) The Annette Hemlock Mill (AHM), was located on Annette Island, just to the south of Ketchikan. This mill, at one time operated by a company called Alaska Prince (AP), was later taken over by KPC and named AHM. Following this acquisition, KSM milled principally spruce and AHM functioned as a hemlock milling facility.

5. When KPC and ALP came to Southeast Alaska in the 1950's, they entered into long-term contracts with the Forest Service which entitled each of them to harvest timber from designated allotment areas for 50 years. KPC's allotment area was located in the south part of the Tongass National Forest, ALP's in the north. Each allotment also designated contingency areas which could be added later. The allotments did not exempt defendants from federal anti-trust laws.

6. ALP later acquired an additional allotment in conjunction with purchasing the AWP mill.

7. KPC's and ALP's allotment contracts each contained stumpage prices which, after initial operating periods of ten years, were to be adjusted every five years. The appraisal information used in these five-year rate redeterminations was also used in connection with independent timber sales. Defendants periodically selected the next allotment areas to be cut and maps of those selections were furnished to the Forest Service for appraisal purposes.

8. Outside the allotment areas, timber sales in the Tongass National Forest were periodically sold at public auction by the Forest Service. In the late 1950's and early 1960's, there were numerous loggers throughout Southeast Alaska who bid from time to time on these timber sales. These loggers formed an association, the Alaska Loggers Association (ALA), but eventually the ALA became a mill-dominated organization.

9. Each year the Forest Service would advertise sales of timber at particular locations, each with an estimated volume and species mix, and would announce a minimum bid. Written sealed bids were then received from parties interested in bidding. Although a few sales were advertised and sold as sealed bid sales (*i.e.*, the sale was awarded on the highest written bid submitted), most sales were sold at oral auctions. These oral auctions would be held among those who had submitted qualifying sealed bids (typically for the advertised minimum).

10. Bidding was based on stumpage rates, *i.e.*, a certain number of dollars per thousand board feet (MBF), which the purchaser paid the government as the timber was harvested. The minimum acceptable bid was calculated by the Forest Service through a process involving the residual value method of appraisal. The Forest Service started with the average selling value of the end products as reflected in statistics collected from the mills, and subtracted from that figure the estimated costs of getting logs from the stump to the end product stage, leaving a residual amount which was then divided between stumpage and a prescribed margin for profit and risk. This process yielded the appraised value of the stand, which would ordinarily be the minimum acceptable bid. This method of arriving at residual values and minimum stumpage prices was used throughout the United States for all national forest timber.

11. In the 1950's and early 1960's, the Forest Service designed and advertised sales requested by particular loggers. It was the Forest Service custom and practice to put up an independent sale close to where a logger was completing another sale to provide that logger the benefit of a continuing operation. Although every timber sale was advertised on a competitive basis, loggers with established operations had a natural bidding advantage with respect to new sales being offered near their existing camps.

12. The early Forest Service timber sales were mostly small sales designed for small logging operations. During the 1960's, the Forest Service, for a number of reasons, began to phase out such small sales. This decision posed a significant obstacle to the continuing operations of small purchase loggers.

13. The purchase and sale of standing timber constituted a distinct market in Southeast Alaska.

14. A second product market was the purchase and sale of logs, as distinguished from standing timber. This, in the earlier years, was done to a great extent by independent purchase loggers, that is loggers who bought timber at Forest Service sales, cut the timber and sold the logs. In the later years, defendants received almost all their log supply from contract loggers, that is, loggers under contract to log timber owned or controlled by one of the defendants. Reid Brothers Logging Company was apparently the last remaining independent purchase logger operating in Southeast Alaska when it purchased the Muddy River #3 timber sale described *infra*.

15. In the 1950's and 1960's, a large proportion of logging in Southeastern Alaska was done by "A-frame" operators, who cut timber near the beaches and pulled the logs into the water for rafting with an A-frame apparatus. Much of the other logging during this period was performed by "cat loggers," who used tractors to move logs cut near beaches to the water. These types of logging required a relatively small capital investment in equipment, personnel, engineering, and planning.

16. Commencing in the early 1960's, the coastal areas and sheltered coves suitable for A-frame and cat logging began to diminish. As the areas suitable for such logging decreased, there arose a governmental concern with the impact of such logging on the coastal environment and the

tourist industry. Therefore, A-frame and cat logging timber sales were phased out by the Forest Service.

17. Many small loggers left the business because they were either unwilling or unable to undertake the larger and more sophisticated logging operations which the Forest Service required. Truck logging, which largely supplanted the old A-frame and cat logging methods, required a larger capital investment than the previous methods used in Southeastern Alaska.

18. In a truck logging operation, logs were yarded to a central point, usually by means of a cable arrangement running from a tower (either a spar tree or a mobile, metal tower). The logs were then loaded on logging trucks, and hauled over roads usually constructed by the logger to a dump site, where they were banded into bundles, dumped and rafted.

19. Reid Brothers, unlike many other operators, was successful in assembling the capital, equipment, and personnel needed to conduct modern truck logging in Southeastern Alaska.

20. A logger who purchased timber from the Forest Service was customarily required to set up a logging camp (bunkhouse, cookhouse, repair shop, log dump, and so on) at the timber sale site. The methods of logging changed over the years. All of the various methods required falling the timber, trimming off the limbs, and bucking the limbed trees into logs of specified lengths.

21. The logs were sold on the basis of a price per thousand board feet (MBF). Rafted logs were towed from the logger's rafting area to a mill storage area. Composition of the rafts varied. Sometimes logs were sorted by grade and species (for example, pulp rafts, hemlock sawlog rafts, spruce sawlog rafts, and so on); in other instances the rafts were assembled as logs came out of the woods, and were called "camp run" rafts.

22. A closely related product market was the purchase and sale of logging services. Some of the loggers in Southeast Alaska worked as contract loggers, and increasingly so as the defendants gained dominance in the market. Contract loggers were paid for providing logging services, *i.e.*, harvesting timber to which someone else owned the stumpage rights.

23. A fourth product market was the milling and processing of logs, carried out by two types of mills; pulp mills and sawmills. In the defendants' pulp mills, wood chips, derived chiefly from the processing of whole logs, and partly from the residue of sawmill operations, were processed into wood pulp. The sawmills in Southeast Alaska produced cants as their main product. Cants were manufactured by cutting logs lengthwise into thick slabs of wood, and represented the minimum degree of manufacture required to permit export under the primary manufacture rule. A small amount of dimensional lumber was also produced.

24. The geographic market was Southeast Alaska itself, which formed a natural area for economic competition. It was distant from the other states of the Union and was subject to transportation barriers. Its distinctiveness was increased by the primary manufacture rule which required that timber cut in Alaska had to be put through at least a basic manufacturing process in Alaska before export. Because of the rule, nearly all timber cut in Southeast Alaska was milled in Alaska. There were few exceptions to the primary manufacture rule.

V. HISTORY OF THE PARTIES IN THE TIMBER INDUSTRY IN SOUTHEAST ALASKA

A. *Plaintiff Reid Brothers Logging Company.*

1. In the late fall of 1968, Reid Brothers Logging Company, which had incorporated, divided its business between Alex and Mary Reid on the one hand and Glenn and Martha Reid on the other. Alex and Mary Reid took an immediate

opportunity to do contract logging for KPC at Shoal Cove. They formed a new company called Reid Timber, Inc. Glenn and Martha Reid continued with the existing company in Petersburg.

2. At the time of the separation, Glenn and Martha Reid became the sole owners of Reid Brothers Logging Company and continued in the logging business. They kept various items of equipment and tools. In the winter of 1968-69, the Reids purchased supplies and additional logging equipment. That spring, they returned to Alaska and built a bunkhouse and a cookhouse for their logging camp.

3. Following the 1968 separation, Reid Brothers bid on the following United States Forest Service timber sales: in 1969, Agassiz Blowdown (2,200 MBF), Douglas Bay Blowdown (5,500 MBF), Mitchell Point Blowdown (19,700 MBF), and Kah Sheets Blowdown (3,740 MBF); in 1970, Shrubby Island (71,800 MBF) and North Trout Creek (66,700 MBF); and in 1972, Muddy River #3 (18,100 MBF). Reid Brothers won each of the sales except Shrubby Island and North Trout Creek.

4. In 1969, plaintiff contracted with Alaska Prince Timber Company, an independent mill operating at Metlakatla on Annette Island, south of Ketchikan, to sell logs to it. Reid Brothers completed the Agassiz sale as a purchase logger, selling the entire production to Alaska Prince during 1969 at $64 per MBF, camp run, and making a profit on that sale. Reid Brothers also entered into a contract with Alaska Prince to sell logs from the Mitchell Point and Kah Sheets sales during 1970 at $64 per MBF, with the provision that the price would be renegotiated for 1971 production. Mr. Reid calculated that Reid Brothers would produce about 10,000 MBF a year.

5. In the spring of 1970, Reid Brothers purchased additional logging equipment, including two rubber-tired skidders, a boom boat, and a sixteen-man bunkhouse. The com-

pany logged the West Portage Bay sale, when it had purchased from another logger, during the spring of 1970, and sold the production to Alaska Prince, making a profit.

6. Reid Brothers logged at Mitchell Point and Kah Sheets Bay from April until December of 1970, closed down its camp for the winter, and returned there in the spring of 1971.

7. In the spring of 1971, Reid Brothers learned that KPC had taken over Alaska Prince. KPC quoted a lower price for 1971 production than Alaska Prince had paid for logs delivered in 1970. Soon afterward, Reid Brothers ceased logging its sales at Mitchell Point and Kah Sheets.

8. In June of 1972, Reid Brothers was the successful bidder at a Forest Service timber sale called Muddy River No. 3. Plaintiff intended to commence logging the sale that year as a purchase logger and continue for three seasons. However, in the course of arranging for an advance of startup money from KPC, Reid Brothers was required by that defendant to sign a document called a "third party agreement" which transferred the stumpage rights to the mill. Reid Brothers logged at the Muddy River sale, delivering the logs to KPC from late 1972 through September 10, 1973.

9. Reid Brothers Logging Company, and the Reids personally, enjoyed good reputations for ability and integrity as loggers. Mr. Reid was active in all phases of his logging operation.

B. *Defendants Ketchikan Pulp Company and Alaska Lumber and Pulp Company.*

1. KPC and ALP functioned primarily as suppliers to the entities which owned them. Because of the predominance of sales to affiliated entities, it was impossible to accurately determine the value of the end products of the defendant mills.

2. In addition to discounts on the sales price of pulp, both of KPC's parents received various fees and commissions which served to reduce the mill's reported income.

3. ALP and its related sawmills (Wrangell Lumber Company and Alaska Wood Products) functioned primarily as suppliers to ALP's parent company, Alaska Pulp Company (APC), which in turn resold ALP's products primarily to its shareholders.

VI. SUMMARY OF DEFENDANTS' COMBINATION AND CONSPIRACY IN RESTRAINT OF TRADE, AND TO MONOPOLIZE

In carrying out the acts described in Sections VII through XV of these findings, KPC and ALP acted pursuant to an agreement, understanding, and concert of action between themselves, the purposes and the actual effects of which have been: to restrict and eliminate competition in all phases of the timber industry in Southeast Alaska to refrain concertedly from competing against each other for timber or logs; to keep would-be competitors out of Southeast Alaska by cutting off their timber supplies through preclusive bidding and other means; to eliminate mill competition by acquiring ownership or control of the sawmills in Southeast Alaska, while expanding their own operations; to control and manipulate the log supply to the few surviving mills; to pay artificially low prices to independent loggers for logs and logging services; to eliminate purchase loggers from the field; and to attain and exercise monopoly power, *i.e.*, the power to set prices and exclude competition, in the timber industry in Southeast Alaska.

Each part of the defendants' combination and conspiracy interlocked with every other part, and was aimed at the same goal of restricting and eliminating competition in the timber industry in Southeast Alaska.

In carrying out their combination and conspiracy, KPC and ALP have operated both by explicit communications with each other and by consciously interdependent action.

VII. THE PATTERN OF COLLUSIVE COMMUNICATIONS AND JOINT PROJECTS BETWEEN KPC AND ALP

1. Defendants KPC and ALP were in the position of competitors as to the procurement of timber, the procurement of logs and logging services, and the manufacture of end products.

2. Despite their position as competitors, ALP and KPC maintained a pattern of communication concerning their respective business operations, and of entering joint projects in procurement and marketing.

3. In January, 1959, KPC's timber manager, Arthur Brooks, sent confidential information to Archie Byers, his counterpart at ALP, concerning KPC's timber sale agreement, and concerning KPC's experience in log scaling. KPC later sent to ALP several more agreements, including its form of agreement for buying logs from independent loggers. During 1959, ALP's first year of operation, Mr. Brooks sent ALP a tentative log purchase agreement embodying prices which KPC intended to pay to independent loggers for logs. Mr. Brooks requested that ALP keep this log price information "strictly confidential." When KPC's log prices later were revised, Mr. Brooks sent ALP the revised log prices in detail, by species and grade. These were the prices KPC intended to offer in the forthcoming season to independent loggers for logs.

4. Following Mr. Brooks' transmittal of log price list, an ALP memorandum stated that these prices were supplied by an employee of KPC and should be held in strictest confidence to maintain contacts for this type of price information.

5. KPC provided confidential information to ALP concerning its wage scales and union agreement.

6. Two ALP accountants, Messrs. Sincock and Forhan, met with KPC officials in March, 1959, to obtain information

concerning KPC's logging costs, which KPC provided. KPC also provided ALP with information concerning various logging techniques and construction devices.

7. After Mr. Byers left ALP, Mr. Brooks' counterpart at ALP was Charles MacDonald. Mr. Brooks was a personal friend of Mr. MacDonald, and the two exchanged business information and arranged for joint commercial enterprises.

8. KPC sold spruce and cedar logs to other mills. It gave ALP's affiliate, Wrangell Lumber Company ("WLC"), preference with respect to spruce log sales and first opportunity to buy KPC's cedar logs.

9. In the early 1960's, ALP and KPC engaged in a joint venture to share in the production and processing of logs from Kosciusko Island and Heceta Island. Since the timber subject to the joint venture was allocated according to the agreements, it made no difference which of the participants was the actual bidder on any of the timber sales, and there was no competitive bidding by the participants on the timber covered by the joint venture agreement.

10. KPC and WLC exchanged logs with each other.

11. KPC provided information to ALP concerning KPC's allotment reinventory project with the Forest Service, and requested information about ALP's allotment reinventory project.

12. ALP and KPC exchanged information concerning log towing and tow rates, which were essential aspects of mill operations in Southeast Alaska.

13. KPC and ALP entered and carried out an agreement to market cedar logs in Japan and divide the profits between them. They adopted a practice whereby, on sales of cedar by KPC to ALP, one price was invoiced and treated as the public price, and a higher price, separately invoiced on a confidential basis, was the actual price. The true price was concealed from the Forest Service, the

loggers, and the public. The purpose for concealing the true price was to depress stumpage values.

14. Mr. Brooks visited the ALP mill in Sitka many times, and spoke every year on many occasions to ALP executives, both in person and by telephone.

15. Following Mr. Brooks' departure from KPC in 1969, communications between the two companies continued. Both David Murdey and Donald Finney, who shared Mr. Brooks' former responsibilities during the 1970's, had frequent contacts with ALP executives. Mr. Murdey discussed the timber industry in Southeast Alaska, while he was Timber and Lumber Manager for KPC, with numerous representatives of ALP. While holding the position of KPC's Timber and Lumber Manager, from July, 1969, through November, 1974, Mr. Murdey talked with Clarence Kramer of ALP concerning logs, independent timber sales, log supply, stumpage rates, unionization of logging camps, industry concern over the environment, Forest Service problems, the Sierra Club, tow rates, round log export, SBA set-aside rules and regulations and "a multitude of things."

16. Executives of KPC and ALP had frequent contact at meetings of trade associations to which both belonged, including the Alaska Loggers Association, the Alaska Lumbermens Association, and the National Forest Products Association.

VIII. THE DEFENDANTS CONCERTEDLY REFUSED TO COMPETE AGAINST EACH OTHER FOR TIMBER OR LOGS, AND DIVIDED THE MARKET BY AGREEMENT

A. *KPC and ALP Needed Outside Logs and Faced a Chronic Shortage of Timber*

1. While both defendants held long-term allotments from the Forest Service, it was understood from the beginning that these would not provide the pulp mills' entire

log requirements. The rest of the mills' suppy was to come from independent Forest Service sales and the purchase of logs from others.

2. Both companies were concerned about a shortage of timber on the allotments. Re-inventories demonstrated that there was less timber on the allotments than the Forest Service had estimated. The shortage meant that the companies would have to look more to outside log sources than they had initially planned. The whole Tongass Forest, both within and without the several allotments, was hard pressed to meet the requirements of the mills.

3. Throughout the period primarily covered by the evidence (1959-75), KPC and ALP claimed that they were chronically short of timber. Log supply continued to fall short of mill capacity. Both defendants were concerned about over-cutting—that is, cutting more in a year from an allotment than the annual average computed by dividing the number of years of the contract into the total volume allowable.

4. Both defendants were concerned about the possible entry of new mills which would compete for the limited timber supply and both took action to prevent new entry from occurring.

5. While both defendants needed additional timber from outside their allotments, the independent cut in the Tongass National Forest declined steadily from 1971 to 1975.

B. *KPC and ALP Concertedly Refused to Compete Against Each Other for Timber and Logs.*

1. In a competitive marketplace, KPC and ALP, faced with this chronic shortage and an ongoing concern over supply, would have competed vigorously for independent timber sales and for logs produced by independent loggers. Instead, the defendants refused to compete against

each other for independent sales or for logs throughout the period 1959-75.

2. The defendants' motives for refusing to compete were to minimize costs, to avoid paying competitive stumpage prices which could lead to competitive prices to loggers for logs, and to avoid paying competitive prices which could lead to reappraisal of their long-term allotment prices at higher levels.

3. The said course of conduct by the defendants was deliberate and interdependent. Each defendant refrained from competing against the other for timber sales and logs in reliance upon the other's reciprocal refusal to compete; competition inaugurated by either defendant would have required the other to act competitively as well in order to insure a supply.

4. When ALP entered the market, KPC pulled back from certain areas where it had traditionally procured timber, and the two pulp companies thereafter confined themselves generally to mutually-observed "operating areas."

5. Mr. Brooks described the line delineating the two defendants' operating areas as starting south of Wrangell Narrows, going west through Sumner Strait, and turning south so as to place Kosciusko and Heceta Islands within the ALP operating area.

6. Kosciusko and Heceta Islands, allocated to ALP by the defendants' agreement, constituted an area from which KPC had procured logs before ALP's entry into the market. These islands were among the best spruce areas in Southeast Alaska, but they became and remained without challenge from KPC a part of ALP's operating area.

7. Even as the timber shortage grew more severe, KPC persisted in avoiding competition by staying out of ALP's operating area.

8. In January, 1974, Mr. Finney wrote to Mr. Murdey, setting forth a proposal to modify the existing division of territory between ALP and KPC on the west coast of Prince of Wales Island. This letter reflects a pre-existing collusive division of the market.

9. Over the period 1959-75, hundreds of millions of board feet of valuable timber went to each defendant with no competition whatever from the other. Over the entire time of Mr. Brooks' tenure from the early 1950's until his departure from the company in July of 1969, he could recall no instance of KPC's having competed with ALP for timber. Mr. Hayashi of ALP testified that in the period 1971-74 the two pulp companies never competitively bid against each other on a timber sale.

10. Some of the bidding by KPC and WLC was done in their names, and some by companies organized for that purpose or loggers whom they controlled. When a controlled company or logger bid, the pulp mill dictated the extent of the bidding.

11. The record of bidding on independent timber sales reveals an unmistakable pattern of collusion by the defendants. Out of 116 sales over the ten-year period from 1966 to March, 1975, KPC and ALP bid orally against each other (directly or through others) only three times. The three exceptions all occurred in 1970, and were the Shrubby Island sale, North Trout Creek, and Bear Creek #1. These were the result of a temporary disagreement between the defendants.

12. Over the ten-year period 1966-March, 1975, there were 27 sealed bid sales put up by the Forest Service in Southeast Alaska. On these, the defendants never bid against each other at all.

13. In terms of volume, the defendants concertedly refrained from bidding against each other on 91.7% of the total volume offered by the Forest Service during the aforesaid ten-year period.

14. The defendants' refusal to compete embraced the procurement of both cut logs and standing timber. Although loggers and logs were much in demand, neither defendant ever made an offer to buy logs from a logger which it understood was selling logs to the other defendant.

IX. THE DEFENDANTS CONCERTEDLY KEPT OUTSIDE MILLS FROM ESTABLISHING COMPETITIVE FACILITIES BY CUTTING OFF THEIR TIMBER SUPPLIES THROUGH PRECLUSIVE BIDDING AND OTHER MEANS

1. ALP and KPC concertedly prevented outside mills from establishing competitive facilities in Southeast Alaska. The defendants' main purpose in excluding mill competitors was to prevent competition for logs and timber. The would-be mill entrants, having no long-term allotment areas, needed to purchase independent Forest Service timber sales, and/or to acquire logs from independent loggers, in order to get established. The defendants prevented this by bidding preclusively, each in its own operating area, to prevent the would-be entrants from getting a log supply, and by denying them access to logs produced by local loggers.

2. In 1966, the City of Petersburg made a request to the Forest Service that a large timber sale be put up that would permit the establishment of a green veneer plant in the Petersburg area. As a consequence, the Kake #1 timber sale was offered, containing an estimated volume of 264,000 MBF, the largest independent sale ever offered in Southeast Alaska. The Forest Service hoped that offering this

sale would result in the establishment of a veneer operation in Southeast Alaska. Among the bidders on the Kake#1 timber sale were three veneer-plywood companies and Mitkof-Wrangell, the eventual winner, which was a joint venture between Wrangell Lumber Company and a small Petersburg mill, Mitkof Lumber Company. Mitkof-Wrangell outbid the plywood companies, paying a bid premium (the amount in excess of the Forest Service advertised minimum) of $2,244,000. The second and third highest bidders were Tongass Veneer and Plywood and Astoria Plywood.

3. Three months after the veneer companies were outbid by ALP on the Kake #1 sale, the Forest Service offered the Tuxekan sale, located in KPC's "operating area." This was another large sale (126,600 MBF) and attracted Astoria Plywood and Tongass Plywood, two of the major veneer companies, as bidders.

4. On the morning of the Tuxekan sale, KPC and Ketchikan Spruce Mills formed a joint venture which they named Panhandle Logging Company, for the sole purpose of bidding on the sale. Panhandle was formed so that its true identity and connection with KPC would not be known. Charles MacDonald of ALP attended the sale, but ALP did not bid. Panhandle outbid both veneer companies.

5. The day after the Tuxekan sale, Tongass Plywood was outbid by Don Meurs Logging Company on the Gas Rock timber sale. Meurs bid nearly four times the advertised minimum price. Meurs was actually bidding on behalf of ALP.

6. On the Bradfield River #1 timber sale, the next sale bid on by a plywood company, WLC outbid Puget Sound Plywood.

7. In January, 1967, the Forest Service advertised the Big Harbor-Trocadero Bay timber sale for February, 1967, in the KPC operating area. Mr. Brooks anticipated that the plywood companies would bid on this sale, and wrote

to the KPC president that KPC should bid in this timber to "keep others out of our area." During the weeks following that letter, Mr. Brooks met on a number of occasions with representatives from the plywood companies.

8. One week prior to the Big Harbor-Trocadero sale, Brooks reported that he discussed the sale with the plywood companies and was told they would not bid. KPC won the sale at the minimum without competition.

9. In June, 1967, ALP met with representatives of the plywood companies. By the time of this meeting, several plywood companies had bid on timber sales in Southeast Alaska, but in every instance they failed to get a timber supply. A few days after that meeting, LOG Logging Company was the successful bidder against the plywood companies on the East Edna Bay sale. LOG was actually bidding that sale for ALP.

10. The next major timber sale offered by the Forest Service was the Shoal Cove sale near Ketchikan in September, 1967, containing 34,700 MBF. Mr. Brooks wrote to his company's president that he anticipated "strong competition" from the plywood companies and that "the bidding should be done in the name of Panhandle Logging Company to avoid having KPC bidding on high priced stumpage."

11. Faced with an inability to obtain a log supply, some of the plywood companies tried to negotiate log supplies from the defendants. They were unable to do so.

12. Mr. Brooks met with potential entrants, including plywood operators, to tell them of possible shortages of timber in the area and that there would not be enough timber to go around if they came in.

13. The defendants' concerted efforts to exclude competition were entirely successful throughout the period 1959-75. The bidding record on timber sales makes clear

that competition by ALP or KPC for timber sales was limited almost entirely to instances in which one of them was bidding against a third-party mill for timber.

X. THE DEFENDANTS FURTHER ELIMINATED MILL COMPETITION BY SYSTEMATICALLY ACQUIRING OWNERSHIP OR CONTROL OF THE SAWMILLS IN SOUTHEAST ALASKA, AND BY EXPANDING THEIR OWN OPERATIONS

A. *Defendants Acquired Ownership or Control of Virtually All the Sawmilling Capacity in Southeast Alaska.*

1. ALP and KPC acquired ownership or control of virtually every sawmill which at one time operated as an independent manufacturing facility in Southeast Alaska. These included Alaska Prince Timber Company, Ketchikan Spruce Mill, Schnabel Lumber Company, Alaska Timber Corporation, Alaska Wood Products, Alaska Forest Products, and Mitkof Lumber Company. Defendants' primary purpose in acquiring or controlling these mills was to eliminate competition for timber and logs.

2. The elimination of Alaska Prince by KPC effectively eliminated Reid Brothers' principal log buyer in the 1970's.

3. Originally, Mr. Brooks tried to dissuade Oji Paper Company of Japan from constructing its Alaska Prince mill. When this failed KPC set about to prevent AP from obtaining a log supply at anything other than prohibitively high prices.

4. KPC was concerned about AP competing for logs from independent loggers and AP's paying the individual loggers higher prices for their logs.

5. Mr. Brooks made clear to Alaska Prince that before Alaska Prince negotiated for logs from a logger, it should determine whether the logger was indebted to KPC, and if he was, should be prepared to pay his indebtedness in cash. Mr. Brooks wrote to Mr. Schmidbauer that KPC could

forestall Alaska Prince from getting logs by calling KPC's loans to its independent loggers or insisting that Alaska Prince take over KPC's financing.

6. Alaska Prince remained desperate for a timber supply. The two timber sales on which KPC knew that Alaska Prince was likely to bid were the East Side timber and the Turn Point #2 sales. KPC paid large premiums to deny Alaska Prince a supply on both of these sales.

7. KPC bid the East Side sale, in the name of Hollis Logging Company, from a Forest Service advertised minimum of $9.72 to $26.60, which Mr. Brooks described as the "highest priced sale to date on the Tongass National Forest."

8. With regard to the Turn Point #2 sale, Mr. Schmidbauer of KPC instructed the KPC timber manager to outbid Alaska Prince "regardless of cost" and "at any price."

9. In the fall of 1970, the owners of Alaska Prince approached KPC on the subject of selling the mill. They were unable to secure enough timber to stay in business.

10. Mr. Merlo recommended to his Board of Directors that KPC acquire the Alaska Prince Mill, and KPC did so in early 1971. As part of the arrangement, KPC acquired by third-party agreements the few timber sales which Alaska Prince had managed to acquire. Among the loggers selling logs to Alaska Prince at the time KPC acquired the company was Reid Brothers.

11. Ketchikan Spruce Mills (KSM) was established in 1903. Prior to KPC's starting operations in Alaska, *i.e.*, from 1903 through 1955, KSM acquired its log supply from independent loggers and by purchasing Forest Service timber sales. Beginning in about 1955-56, KSM ceased purchasing logs from independent loggers, abandoned its own

logging operations, and became dependent upon KPC for 100% of its log supply.

12. At a later time, GP threatened to build its own sawmill and raise its log prices to KSM during the period of construction. KSM sold out to Georgia-Pacific in late 1967.

13. Schnabel Lumber Company (Schnabel) operated a sawmill at Haines, Alaska, in the North Tongass.

14. In the late 1960's and through the mid-1970's, Schnabel and Wrangell Lumber Company had a ten-year agreement whereby WLC supplied logs to Schnabel and Schnabel sold all of his lumber and wood chips to WLC. During that ten-year contract, Schnabel fell progressively further into debt to WLC.

15. Throughout the early 1970's both ALP and KPC knew that Schnabel was short of sawlogs to operate his mill. However, KPC refused to sell logs to Schnabel because he was allocated by agreement to ALP.

16. ALP exercised control over the Schnabel mill by means of indebtedness, control over supply, and restrictions on Schnabel expressed in the agreements between Schnabel and WLC.

17. Edward Head had been an experienced mill operator in Northern California. In 1969, he formed Annette Timber Company (predecessor to Alaska Timber Corporation) and sought to obtain timber sales to support a new mill operation.

18. Mr. Head acquired the Devil's Club #2 sale in June, 1969. Mr. Schmidbauer then instructed Messrs. Murdey and Finney of KPC to keep Mr. Head from purchasing any additional timber sales or establishing a competing mill. Mr. Murdey discussed Head's efforts to obtain financing from the National Bank of Alaska with the bank's manager.

19. Unable to obtain sufficient financing, Mr. Head was finally obliged to sell his partially completed sawmill to KPC in exchange for a commitment for financing to complete construction and a lease-back and purchase-option. The agreement also provided that KPC would supply the mill with a guaranteed volume of logs annually for a ten-year period and would have the right to market all of its lumber production.

20. The Alaska Forest Products (AFP) sawmill was operated at Haines, Alaska, by Dant & Russell. AFP and WLC had a ten-year agreement which gave WLC the right to purchase all of AFP's production.

21. During 1973-75, AFP faced a critical log supply problem. Leroy Lambert, timber manager for Dant & Russel, traveled to Sitka in August, 1974, to attempt to purchase logs for AFP. ALP advised Lambert that there were no logs available, and that it had none for sale.

22. AFP bid on the Hamilton River #1 timber sale on October 18, 1974. The purchase of that sale by AFP was regarded as vital by the company's management.

23. ALP outbid AFP on the Hamilton River #1 sale, which was located within ALP's operating area, by bidding stumpage from the advertised minimum of \$17.10 to \$63.72. KPC did not bid on the sale.

24. Still seeking a supply, AFP bid on the Bear Creek #2 sale. This sale was located in the KPC operating area. ALP did not bid. KPC outbid AFP on the sale, bidding the hemlock from \$21.09 to \$43.00. AFP subsequently closed down its mill.

25. The Alaska Wood Products (AWP) mill was constructed in the mid-1960's in Wrangell. In 1968, WLC purchased the outstanding stock of AWP.

26. Mitkof Lumber Company (MLC) began operation as a small sawmill in approximately 1954. In 1966, Mitkof entered into a joint venture agreement with Wrangell Lumber Company, at the latter's suggestion, for the purpose of bidding on the large Kake #1 timber sale and the Shrubby Island timber sale.

27. In late 1973 or early 1974, WLC approached Lars Eide, the owner of Mitkof, and offered to purchase Mitkof's stock. It was agreed that WLC would (1) acquire 40% of the Mitkof stock, (2) fill Mitkof's log requirements at Wrangell's cost, and (3) market the cants which Mitkof would produce for a percentage commission.

28. WLC's attorneys were concerned that the proposed acquisition might run afoul of SBA regulations and might disqualify Mitkof from bidding on small business set-aside sales. The agreement was therefore modified to provide that Mitkof stock would be sold to individuals in Tacoma who were minority shareholders of the company; the full amount necessary to purchase the stock ($403,975) would be loaned by WLC; and WLC would have an option to purchase the Mitkof stock. The transaction was completed on this basis in the spring of 1974.

B. *Defendants Expanded the Capacity of Their Own Milling Operations.*

1. In addition to their acquisition of sawmill facilities, both KPC and ALP expanded their own operations.

2. The KPC pulp mill had been constructed in 1954 with a theoretical capacity of 350 tons per day. By 1975 it had been expanded to produce 600-630 tons per day. KPC initially had no sawmill capacity. In addition to the sawmills it acquired, it constructed an additional sawmill adjacent to its pulp facility at Ward Cove.

3. ALP increased its sawmill capacity from approximately 40,000 MBF in 1961 to 150,000 MBF in 1973, including the acquisition of Alaska Wood Products. ALP also increased the capacity of its pulp mill during this period.

XI. THE DEFENDANTS USED "FRONTS" AND CONTROLLED COMPANIES TO CARRY OUT THEIR CONSPIRACY

1. From the mid-1960's on, both defendants used "fronts" and controlled companies as one means of carrying out their conspiracy. Their purposes in doing business through such organizations, rather than in their own names, were to conceal certain of their bidding activities on independent Forest Service timber sales, to avoid association with what they described as high-priced stumpage, to conceal their exclusion of potential entrants, to obscure their control over contract loggers, and to avoid criticism directed at their increasing control over the industry.

2. Panhandle Logging Company was one of the fronts used by KPC. It was formed by KPC and Ketchikan Spruce Mills in 1966, before KPC acquired KSM. Its only function and purpose was to bid on timber sales for KPC. Panhandle bid successfully on the Tuxekan sale in 1966. Both KPC and KSM submitted qualifying bids for the sale, but did not bid orally.

3. Panhandle also won the Shoal Cove timber sale. This occurred after KPC's acquisition of KSM. KPC again submitted a qualifying bid, but did not compete in the oral bidding. The sale was managed and financed by KPC.

4. Straits Logging Company, originally an independent logging company, was used by KPC to bid timber sales and to promote and advocate positions favorable to the pulp mills. Straits appeared in the role of an independent logging company long after all right, title and interest in Straits had been assigned to KPC.

5. KPC also used other controlled logging companies like Carroll Creek when it submitted bids. As with Straits, its ownership by KPC was concealed from the general public.

6. KPC used Morris & Sublett, another logging firm, to bid on the Bat Cove timber sale, with the aid of a cashier's check on which KPC's name did not appear.

7. KPC bid the Carroll A-frame show through Tom Williamson.

8. ALP did not bid on timber sales in its own name. Although timber and log procurement were handled by ALP's woods division manager at Sitka, the bidding on timber sales was always done in the name of WLC, AWP, or an ALP-owned or controlled logging company.

9. ALP acquired L.O.G. Logging Company in 1963 and Don Meurs Logging Company in 1964. In each instance ALP transferred the stock to nominee shareholders. L.O.G. and Meurs were frequent bidders on Forest Service timber sales. From and after the time of their acquisition, the bidding by these companies was in fact done for ALP.

10. Much of the defendants' preclusive bidding against outside mills was done in the names of bidding fronts. This was true, for example, with respect to the Tuxekan, Shoal Cove, and Kake #1 sales. In all instances in which KPC and ALP bid successfully against plywood and veneer companies seeking to get established in the market, the bidding was done through controlled logging companies.

11. During the 1960's and 1970's the defendants made increasing use of mill-owned or controlled loggers which retained or adopted names implying that they were independent.

XII. PURSUANT TO THEIR CONSPIRACY DEFENDANTS PAID ARTIFICIALLY LOW PRICES TO LOGGERS FOR LOGS, AND ELIMINATED PURCHASE LOGGERS FROM THE FIELD

A. *Artificially Low Prices for Logs and Logging Services.*

1. The defendants adopted a common scheme of paying artificially low prices for logs and logging services. The prices paid were related to defendants' estimates of logging costs, not to the value of logs, and resulted in loggers accumulating massive debt account with the mills.

2. This was done with both purchase and contract loggers. As this system worked, defendants advanced funds to loggers to cover the difference between the prices paid and the higher cost which the loggers actually incurred. Defendants knew, or expected, that these advances would not be repaid.

3. Both defendants utilized various devices such as operating assistance allowances, bonuses, retroactive price increases, debt write-offs, account adjustments and non-price subsidies. The intended and actual effects were to reduce costs of procurement and avoid statistics which could lead to increased stumpage prices. These devices were used to keep selected loggers functioning but under control. As a practical matter, when one of the defendants cut off further financing of an indebted logger, the logger would go out of business. The defendants then acquired the companies themselves or their assets.

4. The defendants' systematic restraint of prices was interdependent. Each could, and did, impose artificially low prices upon loggers only on the basis that the other would do the same.

5. Had either defendant commenced to pay competitive log prices, the other would have been compelled to follow suit; but that did not occur.

B. *The Result of Defendants' Collusive Pricing Was the Elimination of Independent Logging Companies*

1. Defendants' administered prices tended to eliminate independent loggers and replace them with defendant-owned or controlled companies.

2. Control over the following companies was acquired by KPC: Norton Logging, J & H Logging, H & G Logging, Hagen & Sundsten Logging, Island Enterprises, Burrell Logging, Morris & Sublett Logging, Hollis Logging, Davidson Logging, Venable Logging, Williamson Logging, LeMay Logging, Sunny Bay Logging, Ed Johnson & Sons Logging, Winsenberg Logging, and Sawyer Reynolds Logging.

3. Control over the following companies was acquired by ALP: L.O.G. Logging, Don Meurs Logging, Whitewater Logging, Barton & Reynvaan, Clear Creek Logging, Mud Bay Logging, and Tyler Brothers.

XIII. KPC AND ALP ATTAINED AND EXERCISED MONOPOLY POWER IN THE TIMBER INDUSTRY IN SOUTHEAST ALASKA

A. *Geographic Market and Product Markets.*

1. These are set forth earlier in these findings.

B. *Defendants' Market Share.*

1. Over the period 1959-75, KPC and ALP combined purchased over 90 percent of the timber that was being cut in Southeast Alaska and manufactured at least 90 percent of the manufactured products. The 90 percent market share was divided about equally between the two defendants.

C. *The Defendants' Attainment and Exercise of Monopoly Power.*

1. The defendants attained and exercised monopoly power, that is, the power to set prices and exclude competitors in the timber industry in Southeast Alaska.

2. The defendants' attainment of monopoly power resulted from their collusive use of their position as pulp mills to exclude and extinguish all competition for logs and to eliminate competition between themselves.

3. The defendants exercised their monopolistic power to set prices by paying loggers artificially low administered prices for logs and logging services, rather than prices based on supply and demand.

4. The defendants' monopoly power was unlawfully attained and was unlawfully exercised to the injury of nondefendant mills and loggers in Southeast Alaska.

XIV. CO-CONSPIRATORS

In carrying out their combination and conspiracy, the defendants acted with and used other co-conspirator persons, firms, and corporations, including: Wrangell Lumber Company, Alaska Wood Products, Ketchikan Spruce Mills, Georgia-Pacific Corporation, Louisiana-Pacific Corporation, FMC Corporation, Alaska Pulp Company Ltd., Alaska Loggers Association, Panhandle Logging Company, Straits Logging Company, Pacific Commercial Company, Don Meurs Logging Company, L.O.G. Logging Company, and other "front" and affiliated companies. The participation of some of the said co-conspirators was the result of economic compulsion by the defendants. Each of the said persons, firms, and corporations performed acts or made statements in furtherance of the combination and conspiracy as set forth elsewhere in these findings.

XV. REID BROTHERS WAS DAMAGED BY DEFENDANTS' COMBINATION AND CONSPIRACY IN RESTRAINT OF TRADE, AND BY THEIR EXERCISE OF MONOPOLY POWER

A. *Reid Brothers, as a Purchase Logger, Would Have Received in an Unrestrained Market Prices Which Reflected the Market Values of Its Logs.*

1. When a log market is restrained, as the Southeast Alaska market was by the defendants' anticompetitive conduct, the result is injury to the log suppliers. As a direct result of the defendants' antitrust violations, Reid Brothers received less for its logs, and hence less net income, than it would have received in an unrestrained market.

2. There was substantial unused mill capacity in the pulp mills and in other sawmills of Southeast Alaska throughout the years 1971 through 1974. The unused capacity each year was far greater than would have been needed to consume Reid Brothers' logs. In a competitive market, manufacturers will normally pay whatever is needed to acquire logs in order to operate at full capacity, so long as they can do so at a professional level.

3. By the time Reid Brothers purchased the Muddy River #3 sale, competition in the market had been eliminated by the defendants' conspiracy and monopolization. Alaska Prince, which had bought logs from Reid Brothers, was no longer in business.

4. Absent defendants' anticompetitive conduct, Reid Brothers would profitably have operated as a purchase logger at Muddy River No. 3. This logging would have been completed in 1974. Reid Brothers' logging capacity in 1972 was in excess of ten million board feet per year.

5. On September 10, 1973, Mr. Finney of KPC wrongfully terminated its contract with Reid.

6. In an unrestrained market, Reid Brothers would, although with difficulty, have been able to raise sufficient funds to operate as a purchase logger at Muddy River No. 3. Start-up financing could have been obtained from a combination of the Reids' personal assets and as much as $100,000 from the Hammer & Wikan Retail Store. In an unrestrained market, log prices would have justified such an investment. Once Reid Brothers started Muddy River #3 as a purchase logger, it could have logged the sale through to conclusion at the price levels which would have prevailed in an unrestrained market.

7. In an unrestrained market, contractual log prices between Reid Brothers (as a purchase logger) and KPC (or other log buyer) would have been renegotiated on at least an annual basis.

8. KPC's offer of $64.00 per MBF for Reid Brothers' logs from Muddy River No. 3 was a "cove price": it applied to logs rafted and ready to tow at Reid Brothers' booming grounds. KPC was to bear all the expenses of towing (including insurance), booming and rafting gear, scaling, and forestry and engineering assistance.

9. To place log mill pond prices on the same footing as KPC's "cove price" offer to Reid Brothers in 1972, the costs of towing, scaling, booming and rafting gear, and forestry and engineering, along with a reasonable allowance for profit and risk on these expenses, must be subtracted from such log mill pond prices.

10. Upon making these adjustments, it appears that KPC's price offer fell considerably below the prices which a purchase logger in an unrestrained market could have commanded between 1972 and 1974. This differential is primarily attributable to defendants' conduct in artificially restraining the log prices paid by mills.

11. Had the market in Southeastern Alaska not been artificially restrained by defendants, Reid Brothers would not have agreed to log Muddy River No. 3 as a contract logger for KPC.

12. In a genuinely competitive market, stumpage rates between 1972 and 1974 would have been higher than they were in fact. Rising log prices would have encouraged more active bidding by mills and purchase loggers. This incentive to bid, however, would not have increased substantially until the dramatic end-product price increases of 1973 and 1974. Even if log prices had been unrestrained, the evidence fails to establish that a significantly higher bid price would have been required for Reid Brothers to purchase that sale.

13. In an unrestrained market, a significant percentage of end-product price increases would be "passed through" the mills to log owners (e.g., purchase loggers). This "pass through" is accomplished by periodic (e.g., annual) price increases in the contracts by which mills purchase their supply. "Pass through" is reduced when mills have substantial log inventories, or when end-product price increases are sudden or short-lived departures from traditional price trends.

14. Dr. Carl A. Newport's comparison between Western Washington and Southeastern Alaska provides a reasonable basis for determining how end-products price increases would have benefited a purchase logger in a competitive market, operating at Muddy River No. 3 between 1972 and 1974.

15. The price paid by a mill to a purchase logger in a competitive market is determined by forces of supply and demand. Assessing these factors as they existed in Southeastern Alaska during the period of plaintiff's claim, the Court finds that 30% of end-product price increases

would have been "passed through" to Reid Brothers at Muddy River No. 3. In Southeastern Alaska, the capital intensiveness of pulp milling would tend to increase the mills' share of end-product price increases, even in a competitive market.

16. Reid Brothers' profit at Muddy River No. 3 would have been a function of the escalating prices for hemlock, spruce, cottonwood, and culls, that would have been paid in an unrestrained market. Logging costs are best determined by following Dr. Newport's "Alternative I" calculation in Exhibit A-4137. Revenues can best be determined by making an adjustment to Dr. Newport's "Alternative II" values in the same exhibit. This adjustment would reflect a 30% "pass through" of end-product price increases.

17. Reid Brothers' net recoverable damages are computed by subtracting plaintiff's costs from the revenues it would have received in an unrestrained market.

18. Assuming an annual adjustment to the price of each species at Muddy River No. 3, Reid Brothers would have earned revenues totalling $2,111,838.

19. Reid Brothers' revenues at Muddy River No. 3 would have been offset by costs in the amount of $1,615,211.

20. If follows that as a result of defendants' anticompetitive restraint of log prices, Reid Brothers Logging suffered a total loss of profits at Muddy River No. 3 in the amount of $496,627.

21. Under the applicable antitrust laws, Reid Brothers is accordingly entitled to treble damages in the total amount of $1,489,881.

22. Site conditions at Mitchell Point and Kah Sheets made logging unusually difficult and expensive. With blowndown timber running as high as 80% (by Glenn Reid's admission) of the combined sales, all production-related logging costs far exceeded Forest Service regional aver-

ages. These cited conditions were the primary cause of Reid Brothers' unusually low rate of production at Mitchell Point and Kah Sheets.

23. Even in a hypothetical unrestrained market, end-product prices and logging costs were such that Reid Brothers would not have made any profit by logging at Mitchell Point and Kah Sheets.

CONCLUSIONS OF LAW

1. Jurisdiction is vested in this Court, as to plaintiff's antitrust claim herein, by virtue of the provisions of 15 U.S.C. §§ 15, 22, and 26. The Court has pendent jurisdiction over plaintiff's alternative breach of contract claim, and jurisdiction over the counterclaim of defendant Ketchikan Pulp Company, under the provisions of Rule 13, Federal Rules of Civil Procedure.

2. The conduct of defendants Ketchikan Pulp Company and Alaska Lumber and Pulp Company, described in the foregoing Findings of Fact, constituted a combination and conspiracy in restraint of trade and commerce in violation of Section I of the Sherman Act (15 U.S.C. § 1), and a conspiracy and attempt to monopolize, and an actual monopolization of, trade and commerce in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

3. The plaintiff Reid Brothers Logging Company was damaged in its business by the defendants' aforesaid antitrust violations in the amount of $496,627. Under the provisions of Section 4 of the Clayton Act (15 U.S.C. § 15), plaintiff is entitled to judgment against defendants and each of them in the amount of threefold its actual damages, together with its cost of suit including a reasonable attorney fee.

4. Defendant Ketchikan Pulp Company is entitled to judgment on its counterclaim against plaintiff in the

amount of $36,000, the figure to which the parties have stipulated. The said amount should be offset against the full amount of plaintiff's recoverable damages, *i.e.*, after the latter are trebled in accordance with 15 U.S.C. § 15.

5. The application of plaintiff for injunctive relief under the provisions of 15 U.S.C. § 26 is deferred for later consideration by the Court.

6. The Court finds that there is no just reason for delay. Accordingly, under the provisions of Rule 54(b), Federal Rules of Civil Procedure, the Clerk of this Court is hereby directed to enter judgment forthwith for plaintiff on its damages claim against defendants and each of them, and for defendant Ketchikan Pulp Company against plaintiff on its counterclaim, in conformity with these Conclusions of Law.

7. The plaintiff's application for attorney fees under 15 U.S.C. § 15 shall be decided hereafter. Any award made by the Court in that regard shall be reflected in a supplemental judgment.

The Clerk of this Court is directed to send uncertified copies of these Findings of Fact and Conclusions of Law to all counsel of record.

DATED at Seattle, Washington, this 5th day of June, 1981.

/s/ BARBARA J. ROTHSTEIN
Barbara J. Rothstein
United States District Judge

Appendix C

United States District Court
Western District of Washington
at Seattle

No. C75-165(S)R

Reid Brothers Logging Company, an Alaska corporation,
Plaintiff,

vs.

Ketchikan Pulp Company, a Washington corporation;
and Alaska Lumber and Pulp Company,
an Alaska corporation,
Defendants.

[Filed July 7, 1983]

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANT ALP'S DEMAND FOR JURY

This cause comes before the Court on plaintiff's Motion to Strike Defendant ALP's Demand for a Jury. The Court, being fully advised, rules as follows:

On June 6, 1980, defendant ALP informed the parties and the Court by letter that it did not consent to the withdrawal of plaintiff's jury demand. ALP went on to demand a trial by jury in its own right. The Court responded by immediately informing the parties that this case would proceed to trial on July 28, 1980, before the Court as trier of fact and law, on the basis that ALP's demand for a jury trial had been raised in an untimely and improper manner. Plaintiff has subsequently filed this motion to strike ALP's jury demand. ALP has taken the position that it is not precluded from making a jury demand at this late date because Rule 38(d), Fed. R. Civ. P., renders plaintiff's attempt to withdraw its jury demand ineffective.

Rule 38(b) gives any party the right to demand a trial by jury on any issue triable of right by a jury so long as a demand for a jury is made within the time framework prescribed by the rule. Under Rule 38(d), the failure of a party to serve a proper demand constitutes a waiver by him of trial by jury. Because one party might well withhold his jury demand in reliance upon the demand filed by another party, Rule 38(d) further provides that a demand for trial by jury may not be withdrawn without the consent of the parties. *See DePinto v. Provident Security Life Insurance Company,* 323 F.2d 826, 832 (9th Cir. 1963); *Thomas v. Peninsular & Oriental Steam Navigation Company,* 246 F. Supp. 492, 594 (E.D. Pa. 1965). A defendant in an ordinary civil case, therefore, has two options: he may file a jury demand at the outset of the action; or he may rely on plaintiff's demand for jury and object to an attempt by plaintiff to withdraw his demand at some later point in the proceedings.

The Court believes that the facts of this case show that defendant ALP has not relied on plaintiff's demand for a jury, and that defendant has waived any right that it has to object to plaintiff's withdrawal of its jury demand.

ALP argues that its motion to strike jury demand, filed on August 31, 1978, was based on the assumption that Judge Sharp intended to try the five timber cases together. ALP claims that its present change of position on the jury issue is based on events, mainly the decision to try the Reid Brothers' case alone, that transpired after it filed its August 31 motion.

Upon review of the record, however, it is clear that ALP opposed plaintiff's jury demand both before and after defendant was told that the Reid Brothers' case would be tried apart from the remaining four timber cases. At a preliminary pretrial conference and by order on August 30, 1978, Judge Sharp informed the parties of his intention to segregate the trials. Defendants noted this development in their October 18, 1978, reply memorandum supporting their motion to strike jury demand, but nevertheless continued to emphatically persist in their position that a jury could not comprehend the complexities of this large antitrust case. *See* Defendants' Reply Memorandum Supporting Motion to Strike Jury Demand (October 18, 1978) at II-1—II-7. With knowledge that the Reid Brothers' case would be tried first, defendants stated that a jury would be an incompetent fact-finder because of (1) plaintiff's intention to "reach back to 1959" to find documentation supporting the allegations of conspiracy, (2) plaintiff's desire to introduce evidence of the circumstances surrounding the demise of the many independent loggers in Alaska, and (3) the complex accounting issues, timber terminology and government regulations that would be in issue in the case.

There has been no change in the posture of this case since defendants filed their reply memorandum in support of their motion to strike that would support ALP's contention that the issues have changed substantially. In his November 22, 1978, Order on Defendants' Summary Judgment Motions Judge Sharp denied all of defendants' motions pertaining to plaintiff Reid Brothers. At a preliminary pretrial conference on May 29, 1980, and by formal order issued on the same day, this Court denied defendants' Motion to Exclude Evidence Concerning the Circumstances Causing Ninety-Nine Other Loggers to Quit Business. Essentially, the same case that ALP repeatedly said should not or could not be tried to a jury is now ready for trial on July 28, 1980.

It is clear from the course of events that ALP has opposed plaintiff's jury demand both before and after defendant learned that the Reid Brothers' case would be tried apart from the other cases. There has been no development or change in circumstances in this case since defendants filed their reply memorandum in their motion to strike that would indicate that ALP's waiver of a trial by jury was anything but knowledgeable and intentional.

ALP has not withheld its jury demand in reliance upon the demand filed by another party. To the contrary, ALP has clearly and steadfastly expressed its desire to have this case tried to the Court. Rule 38(d) does not prevent this Court from finding that ALP has waived its right to a jury trial. Plaintiff's Motion to Strike Defendant ALP's Demand for Jury is GRANTED, and defendant's demand for a jury is DENIED.

The Clerk of this Court is directed to send uncertified copies of this Order to all counsel of record.

DATED at Seattle, Washington, this 7th day of July, 1980.

/s/ BARBARA J. ROTHSTEIN
United States District Judge

Appendix D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . Every person who shall make a contract or engage in any combination or conspiracy declared by section 1 to 7 of this title to be illegal shall be deemed guilty of a felony . . .

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

3. Section 4 of the Clayton Act (15 U.S.C. § 15) provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

4. Section 4b of the Clayton Act (15 U.S.C. § 15b) provides:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause

> of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

5. The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

6. Rule 38(d), Fed. R. Civ. P. provides:

> A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

7. Rule 39(a), Fed. R. Civ. P., provides that when a trial by jury has been demanded, the trial shall be by jury unless:

> (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury . . .

Appendix E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 81-3444, 81-3448

Reid Brothers Logging Company,
an Alaska corporation,
Plaintiff-Appellee,

vs.

Ketchikan Pulp Company,
a Washington corporation,

and

Alaska Lumber and Pulp Company,
an Alaska corporation,
Defendants-Appellants.

[Filed May 23, 1983]

ORDER

Before: BROWNING, Chief Judge, TUTTLE* and REINHARDT, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

*Honorable Elbert Parr Tuttle, Senior Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

FILED
SEP 21 1983
AS.
CLERK

No. 83-301

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALASKA LUMBER & PULP COMPANY, INC.,
an Alaska corporation,
Petitioner,
v.
REID BROTHERS LOGGING COMPANY
an Alaska corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-301

ALASKA LUMBER & PULP COMPANY, INC.,
an Alaska corporation,
Petitioner,

v.

REID BROTHERS LOGGING COMPANY
an Alaska corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition for a writ of certiorari filed by Alaska Lumber & Pulp Company, Inc. ("ALP") is without merit and should be denied. ALP has incorporated by reference the arguments made in the petition for certiorari filed by its co-defendant in the same case, Ketchikan Pulp Company ("KPC"), cause No. 83-307 in this court, and KPC similarly has incorporated ALP's arguments. Accordingly, Reid Brothers Logging Company ("Reid Brothers"), the respondent herein, submits this brief in opposition to be read together with its brief in opposition to the related petition. For the sake of clarity, respondent's brief opposing KPC's petition in cause No. 83-307 should be read first and this brief should be read second. The abbreviations used herein are the same as those used in respondent's brief in No. 83-307 (see footnote 1 therein).

SUMMARY OF ARGUMENT

This summary condenses the responses to petitioners' arguments herein and in the companion petition, No. 83-307.

The defendants' argument that the district court and court of appeals found that they had conspired in violation of Sherman Act §§ 1 and 2 "based solely upon (1) a variety of legitimate business and personal contacts, plus (2) similar but not consciously parallel conduct" is untenable. The conspiracy in fact was proved by abundant evidence both direct and circumstantial; it was carried out by a combination of explicit communications between the defendants and consciously interdependent action; and it employed a variety of methods of destroying competition. Standard antitrust conspiracy law was applied by the district court and the court of appeals.

The petitioners' argument over standards for "predatory pricing" is not even raised by the record. This is a conspiracy case, not a single-actor attempt-to-monopolize case such as those relied upon by defendants. As part of their conspiracy the defendant pulp mills bid preclusively on timber sales, each in its collusively-set "operating area," to keep out would-be competitors for logs.

It was not necessary to allege or show any mathematical relationship between defendants' costs and the amounts of their bids where the bidding to exclude other mills was part and parcel of a horizontal conspiracy to restrain trade and monopolize.

The argument that KPC's offer to Reid Brothers was "better-than-competitive" is not only over a question of fact, unsuitable for review by this Court, but is utterly specious. The offer in fact was far worse than what respondent would have experienced in a market free of defendants' collusive trade restraints because it embodied a flat three-year price which deprived the seller of periodic price increases which, under competitive conditions, would have resulted from rising end product values. The court of appeals has correctly affirmed the district court's finding that, but for the defendants' antitrust violations, Reid Brothers would have logged the Muddy River No. 3 sale as a purchase logger selling to one or more buyers at prices fluctuating periodically with end product values.

The argument that the statute of limitations was not observed is plainly incorrect in light of the well-established rule that evidence predating the limitations period is admissible to show the origin and nature of the conspiracy. The defendants committed injury-causing acts within the limitations period, and plaintiff was properly awarded as damages the difference between what it actually experienced in its dealings with KPC and what it would have experienced but for the defendants' antitrust violations.

The defendant KPC expressly stipulated in open court to a bench trial of this case several weeks before the trial began. Both defendants had repeatedly moved to strike plaintiff's jury demand, requested a trial to the court even after the Reid Brothers case was designated to be tried separately, and even argued that a jury trial would deprive them of due process of law. The district court correctly ruled that ALP had not relied upon plaintiff's jury demand, which was withdrawn in order to obtain a trial date under conditions of calendar congestion, and that both defendants had waived any claim to a trial by jury. The court of appeals has correctly affirmed on the basis of established law that the right to a trial by jury is not absolute but may be waived expressly or by conduct.

ARGUMENT

A. KPC And ALP Attained And Exercised Monopoly Power In The Timber Industry In Southeast Alaska

The evidence clearly established that the defendant pulp mills, in addition to having conspired in restraint of trade in violation of Section One of the Sherman Act, 15 U.S.C. § 1,[1] had violated Section Two of the Act, 15 U.S.C. § 2, by conspiring and attempting to monopolize, and actually monopolizing, parts of trade and commerce. The district court found (FF XIII, C.1-4):

---

[1] See respondent's brief in opposition to the petition in No. 83-307.

> 1. The defendants attained and exercised monopoly power, that is, the power to set prices and exclude competitors in the timber industry in Southeast Alaska.
>
> 2. The defendants' attainment of monopoly power resulted from their collusive use of their position as pulp mills to exclude and extinguish all competition for logs and to eliminate competition between themselves.
>
> 3. The defendants exercised their monopolistic power to set prices by paying loggers artificially low administered prices for logs and logging services, rather than prices based on supply and demand.
>
> 4. The defendants' monopoly power was unlawfully attained and was unlawfully exercised to the injury of non-defendant mills and loggers in Southeastern Alaska.

The evidence shows clearly that the relevant geographic market is Southeast Alaska. (ER 733-34, 1816-17.) There is no dispute over the relevant product markets: The purchase and sale of standing timber, the purchase and sale of cut logs, the purchase and sale of logging services, and the milling and sale of manufactured products in Southeast Alaska. (ER 734-35, 1817-18.)

Over the period 1959-75, KPC and ALP combined became the purchasers of over 90 percent of the timber being cut in Southeast Alaska, and the manufacturers of at least 90 percent of the manufactured products. (ER 735.) The 90 percent share was divided about equally between them. (ER 735; FF XIII.B.1.) The evidence is overwhelming, and practically uncontradicted, that KPC and ALP attained and exercised monopoly power, that is, the power to set prices and exclude competitors in Southeast Alaska. (ER 733-39, 1816-32.) KPC's expert, Mr. Rickard, admitted as much. (RT 32:1538.)

The monopoly power clearly resulted from the defendants' collusive use of their power as pulp mills to extinguish all competition for logs from sawmills and to eliminate competition between themselves. Defendants' purposeful exclusion of other mills and systematic acquisition and control of competitors, while expanding their own facilities, cannot be justified as "integration"; where integration is natural it is not necessary for manufacturers to take purposeful steps to force competitors out or deny them a supply. (ER 736.)

The defendants exercised their monopolistic power to set prices by paying loggers artificially low administered prices rather than prices based on supply and demand. (ER 714-26, 737-38.) Here again, the applicable standard was admitted by one of defendants' economists on cross-examination. (ER 736-37.) There was no connection between the defendant-imposed prices and the end-product values which normally would be the main factor in determining log values. (ER 714-26, 737-8.) KPC's power to control the log price is admitted in its own documents (SER 132, emphasis added):

> *Ketchikan Pulp Company controls the market price for purchased logs* and has maintained the same price over a ten-year period except for absorbing towing costs averaging $3 per thousand board feet. . . .

The testimony of Mr. Wiener, a recently retired high official of the Forest Service, that the cost-plus contract device "would deprive the logger of any benefits of his having purchased the timber," and is "a luxury that only applies in areas where there are limits on competition," stands uncontradicted. (ER 738.) So does the evidence that in the defendants' administration of the Southeast Alaska market, it was cost accounting, not supply and demand or end-product values, that KPC and ALP used in dictating the manipulative prices they would pay.

The defendants also deliberately attained and exercised the power to exclude competitors in milling and logging. *See* respondent's brief in opposition in No. 83-307. As stated by KPC's timber manager (ER 738):

> The possibility of purchasing more logs is most remote since practically all the loggers in Southeastern Alaska are

financed and controlled by the mills and the mill controlling the timber sales gets the logs.

It is well settled that monopoly power is the power to control prices or exclude competition, *Greyhound Computer Corp.* v. *Int'l Business Machines Corp.*, 559 F.2d 488, 496 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), and that the offense of monopolization under Section 2 consists of (1) the possession of monopoly power in the relevant market, (2) willful acquisition or maintenance of that power, and (3) causal antitrust injury. *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *California Computer Products* v. *Int'l Business Machines Corp.*, 613 F.2d 727, 735 (9th Cir. 1979).

The existence of monopoly power must be measured against a geographic market and a product market. *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *Walker Dist. Co.* v. *Lucky Lager Brewing Co.*, 323 F.2d 1, 9 (9th Cir. 1963), *cert. denied*, 385 U.S. 976 (1966). The relevant geographic market may be national or may consist of areas as small as single city, town, or metropolitan area. *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). Since the statute prohibits monopolization of "any part" of commerce, market definitions vary with the industry, *Greyhound Computer Corp.* v. *Int'l Business Machines Corp., supra*, 559 F.2d at 494 (9th Cir. 1977), and present "a question of fact in each case." *E.g.*, *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 456 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967), *reh. denied*, 390 U.S. 930 (1968). *Accord*, *Telex Corp.* v. *International Bus. Mach. Corp.*, 510 F.2d 894, 915 (10th Cir. 1975), *petition for cert. dismissed*, 423 U.S. 802 (1975) ("[F]indings on this subject are not to be overturned unless clearly erroneous.").

Section 2 of the Sherman Act proscribes, as a distinct offense, conspiracies to monopolize any part of commerce. This prohibits a combination of two or more entities to obtain monopoly-type control in a relevant market. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465 (1921); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898), *affirmed*, 175 U.S. 211 (1899). The rules defining "conspiracy," and its provability by circumstantial evidence, are the same as with Section 1 offenses, *supra*. The elements of a Section 2 conspiracy are the participation of two or more persons, a specific intent to monopolize, and one or more overt acts directed toward achieving a monopoly. *American Tobacco* v. *United States*, 328 U.S. 781 (1946). The defendants' intent may be inferred from the surrounding facts and circumstances. *Times Picayune Pub. Co.* v. *United States*, 345 U.S. 594 (1953); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Alles Corp.* v. *Senco Products, Inc.*, 329 F.2d 567 (6th Cir. 1964).

KPC and ALP concertedly achieved and exercised monopoly power, *i.e.*, committed the offense of monopolization. Nonetheless they are also guilty of the related offense of *attempt* to monopolize under Section 2 of the Sherman Act. *Greyhound Computer Corp.* v. *Int'l Business Machines Corp.*, *supra*, 559 F.2d at 504 (9th Cir. 1977); *Hunt-Wesson Foods* v. *Ragu Foods*, 627 F.2d 919, 926 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

As is often true in antitrust litigation, the same conduct by defendants which violated Section 1, prohibiting combinations and conspiracies in restraint of trade, also violated Section 2, prohibiting monopolies and conspiracies and attempts to monopolize. *See, e.g.*, *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948); *Washington State Bowling Proprietors Ass'n* v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966), *cert. denied*, 384 U.S. 963.

The law condemns with equal vigor the sole monopolist and the group which deliberately acquires and exercises monopoly power. *American Tobacco Co.* v. *United States*, *supra*; *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242 (1959).

The defendants have argued that their monopoly power was "thrust upon" them by their position as the only two pulp mills in Southeast Alaska. The argument is untenable. (ER 1823-28). The "thrust upon" defense has no application where monopoly power was attained or kept through exclusionary practices, territorial allocations, price-fixing, or the like. 3 von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.03[1]. Even where a high degree of market power has been acquired without misconduct, the use of that advantage to foreclose competition, gain a competitive advantage, or destroy competition, is unlawful. *United States* v. *Griffith*, 334 U.S. 100 (1948); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Moreover, a firm violates Section 2 "by using its monopoly power in one market to gain a competitive advantage in another." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, *supra*, at 275; *Greyhound Computer Corp.* v. *Int'l Business Machines Corp.*, *supra*, 559 F.2d at 503 (9th Cir. 1977). Here, the defendants were not entitled to use their economic power as pulp mills to destroy competition in sawmilling, logging, and other parts of the industry.

B. The Evidence Supports The Judgment As To Damages, And Petitioners' Arguments Relating To The Fact Of Damage Are Devoid Of Merit

Petitioners' arguments concerning damages are based on the false statement that KPC's offer to Reid Brothers for its log production was "better than competitive." In fact the offer was at a level below the logger's costs of production and was far worse than what a competitive-market offer would have been because it was for a flat three-year price which deprived the logger of the periodic price increases which normally would occur in a competitive market as end product values went up. The district court and court of appeals correctly held that this type of long-term flat-rate contract was imposed upon loggers by the defendant pulp mills pursuant to their conspiracy to restrain trade. Such contracts had the purpose and effect of keeping loggers under the mills' control while minimizing procurement costs. Reid Brothers was injured because its financial experience on the Muddy River No. 3 logging sale was far worse than it would have been but for the impact on the market of the defendants' conspiracy in restraint of trade and monopolization. The district court's finding of damage was conservative and was reached by the standard methods of determining causation and measuring the amount of damage.

1. **Law governing fact of damage.** It is manifest that the purposes and effects of the defendants' violations were to eliminate the competition of, and thereby injure, independent loggers and would-be mill operators. "When a log market is restrained, as the Southeast Alaska market was by the defendants' anticompetitive conduct," the district court has found, "the result is injury to the log suppliers." (FF XV.A.1.) The issue, then, is whether Reid Brothers qualifies under Section 4 of the Clayton Act, 15 U.S.C. § 15, as a "person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." Clearly the answer is affirmative.

Private antitrust actions are a means mandated by Congress to enforce the antitrust laws for the public benefit as well as to compensate the victims of violations. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co., supra,* 381 U.S. 311, 318 (1965); *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* 395 U.S. 100, 130-31 (1969). This Court has long held that the fact of damage, like any other fact, may be established as a matter of just and reasonable inference from the evidence. *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251, 264 (1946). Thus, where a plaintiff proves an injury, and a violation by defendants of the antitrust laws of such a nature as to be likely to cause that type of injury, the trier of fact must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists. *Continental Ore Co.* v. *Union Carbide Corp., supra,* 370 U.S. 690, 697 (1962); *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* 395 U.S. at 149; *Pacific Coast Agr. Export Ass'n* v. *Sunkist Growers, Inc.,* 526 F.2d 1196 (9th Cir. 1975). *See also*

United States v. *Champion Int'l Corp.*, 1979-2 CCH Trade Cases ¶ 62,862 (D. Ore. 1979), at 78,993.

The plaintiff is entitled to recover its lost net profits not only on sales which did occur but also on sales which did not occur but would have been made in an unrestrained market. *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra*, 395 U.S. 100, 149 (1969); *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 877 (1st Cir. 1966). Lost future profits are an established item of damage, *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 464-65 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964), and are recoverable regardless of whether or not the plaintiff remained in the impacted business throughout the damage period, *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir. 1952), *cert. denied*, 343 U.S. 942 (1952).

None of the cases cited by petitioners in any way diminishes the foregoing rules.

ALP's argument that it was not involved in the Muddy River dealings between KPC and Reid Brothers is unavailing. A conspirator is liable for the acts of his co-conspirators committeed in carrying out the unlawful combination. *Beltz Travel Service* v. *Int'l Air Transport Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980); *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944). It is not necessary that each defendant take part in each act or transaction, or know the identity and function of all the alleged co-conspirators. A participant is liable although he may have knowledge of, or participate in, only one or a few acts in furtherance of the conspiracy. *Esco Corp.* v. *United States*, 340 F.2d 1000 (9th Cir. 1965); *Beltz Travel Service* v. *Int'l Air Transport Ass'n, supra*, 620 F.2d at 1367 (9th Cir. 1980).

Where the plaintiff is a seller injured by a price-depressing conspiracy of buyers, there is no requirement that privity exist between the parties, nor that the plaintiff be a purchaser, seller, or competitor in relation to a particular defendant. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar*

Co., 334 U.S. 219 (1948). A defendant who participates in a conspiracy must "share responsibility for the resulting damage, including that occasioned by activities in which it did not directly participate, or from which it did not directly benefit." *Twentiety-Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 212 (9th Cir. 1964). *See also Karseal Corp.* v. *Richfield Oil Corp.*, *supra*, 221 F.2d 358 (9th Cir. 1955); *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, *supra*, 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944).

2. Competitive log prices would reflect end product values. "The price paid by a mill to a purchase logger in a competitive market," the district court has found, "is determined by the forces of supply and demand." (FF XV.A.15.) All of the evidence in point, including both sides' expert testimony, showed that competitive log prices fluctuate with the market values of the end products produced by the mills. (ER 740-41.) As end product prices rise, competing mills pay more for logs. The court has found: "In an unrestrained market, a significant percentage of end-product price increases would be 'passed through' the mills to the log owners (*e.g.*, purchase loggers)." (FF XV.A.13.) In 1972-74, the exact period when Reid Brothers was logging its Muddy River No. 3 timber sale, and a serious shortage of logs existed, the values of pulp and cants soared and the defendant mills obtained enormous profits. (ER 635-40, 741-49.) But for the defendants' collusive restraints on the market the result would have been substantially increased log prices, affording Reid Brothers a profit.

3. KPC's flat-price, three-year offer was an exercise of defendants' monopoly power and an act pursuant to their conspiracy in restraint of trade. The court has found that in competitive markets the "pass-through" of end product price increases to log suppliers "is accomplished by periodic (*e.g.*, annual) price increases in the contracts by which mills purchase their supply." (FF XV.A.13, ALP App. A-65.) Specifically with regard to Reid Brothers the court has found (FF XV.A.7):

> 7. In an unrestrained market, contractual log prices between Reid Brothers (as a purchase logger) and KPC (or other log buyer) would have been renegotiated on at least an annual basis.

These findings are fully supported by the evidence and refute defendants' argument that KPC's three-year, flat-price offer of 1972 was "better-than-competitive."[2] In fact, KPC's offer was thoroughly anticompetitive and exemplified the defendants' ironclad administered pricing system. (ER 755-58, 1860-61.) As the district court found (FF XV.A.10, ALP App. A-64):

> 10. Upon making these adjustments [to convert a "cove" price to a "millpond" price], it appears that KPC's price offer fell considerably below the prices which a purchase logger in an unrestrained market could have commanded between 1972 and 1974. This differential is primarily attributable to defendants' conduct in artificially restraining the log prices paid by mills.

In a competitive market the contract between a purchase logger and a mill would not call for a fixed price over the entire term of a multi-year logging show; instead, buyers and sellers would adopt contracts allowing them to revise prices periodically. (ER 755-56.) In the Pacific Northwest, described as a competitive market by defendants themselves, the buyers and sellers adjusted prices on a periodic basis ranging from daily to yearly. (ER 755.) Even in Southeast Alaska, when the defendants were sellers rather than buyers the sales contracts provided that the prices would be renegotiated periodically or as often as necessary to reflect changing values. (ER 756.)

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[2] KPC's citation of *Standard Oil Co. v. United States*, 337 U.S. 293 (1949), as having recognized "that even multi-year requirements and output contracts can have legitimate business purposes" is misplaced. The Court there noted that the great majority of the requirements contracts at issue were year-to-year arrangements, terminable at six-month intervals upon thirty days' written notice. *Id.* at 296. Moreover, the Court noted that important considerations in evaluating the anti-competitive impact of requirements contracts were the length of the contracts relative to the requirements of the industry, and the market power of the defendant. *Id.* at 308-309. In no way did the Court imply approval of multi-year contracts such as the one at issue herein, and surely not where such contracts are imposed pursuant to a collusive trade restraint.

However, when Mr. Reid approached KPC to sell logs, defendant responded with a single-price offer for the entire sale even though all concerned knew the project would take three logging seasons and substantial cutting could not begin until 1973. (ER 757.) Mr. Finney of KPC has admitted that the $64 price would have prevailed through the entire sale regardless of end product prices and log value increases (except for minor adjustments given in KPC's sole discretion for such items as wage increases). (ER 757-761.)

Even by 1972 standards KPC knew it was offering less than log values justified. KPC and G-P were making substantial profits on their Alaska operations in the spring of 1972. (ER 757.) In arriving at the $64 camp run price, Mr. Finney computed the average log value to KPC (based on end product prices including sales at artificially low levels to the parent company FMC) at $98/MBF, and calculated a 32% profit for KPC on Reid's logs, more than double the Forest Service's assumed profit ratio for mills. (ER 757.) The upward trend in 1972 was known to large companies such as KPC and ALP. The soaring 1972-74 log prices in the Pacific Northwest clearly show that log prices have no difficulty tracking end product values when competition is present. (ER 779; Ex. 1397, SER 271.)

Defendants argue that Mr. Reid asked for a quotation for the "whole production," but even under Mr. Finney's version there is no evidence that Reid asked for a flat figure at which he would have to sell his logs regardless of increases in their value over three years of logging—which is what KPC imposed upon him. What Mr. Reid asked for was simply a price. His desire was to sell on a season-by-season or raft-by-raft basis; he had sold on both bases in the past. (ER 752, 1860-61.) In a free market a price quote by the pulp mill—whether directed to the "whole production" or not—would have provided for periodic review and adjustment, seasonally or perhaps quarterly. Neither party, in the presence of competition, would be able to impose on the other a flat multi-season price. (ER 1861.)

Mr. and Mrs. Reid did not expect to able to make money on the Muddy River sale at $64 per thousand. (ER 758.) They had to count on future "bonuses" which could be given at the discretion of KPC. (ER 758.) KPC's offer, translated into a $73.81 "mill pond" price,[3] fell $8.28/MBF below what the court has found to be logging costs in 1973 and $17.89/MBF below costs in 1974. (FF XV.A.19, ER 2447.) Compared to the prices which would have prevailed but for defendants' antitrust violations, KPC's offer was $32.10/MBF below the unrestrained market level for 1973 and $49.62 below for 1974. (FF XV.A.15-19, ER 2447.)

The Reids valued their twenty-five year history as independent purchase loggers and planned to log the Muddy River No. 3 sale in that capacity. (ER 752.) However, by the time they purchased the sale the competition that had been struggling to enter the market had been crushed by the defendants' conspiracy and monopolization. (FF IX and X.) Alaska Prince, which had bought logs from Reid Brothers, had been put out of business by defendants' antitrust violations. (FF X.A.10.) Mr. Reid's recollection was that he met with Mr. Rynearson of ALP before the Muddy River bidding and offered to sell logs to ALP if he became the successful bidder. (ER 756.) It is certain that ALP, although it was concerned about running out of logs, knew that Reid Brothers was the successful bidder on the Muddy River sale, and would enjoy an easy tow from the sale site to the WLC mill, made no approach of any kind to Reid Brothers to try to buy logs. (ER 756-57.) Schnabel Lumber Company, a "captive" of ALP, *supra*, offered $63/MBF for Reid Brothers' logs, but the conversation between Messrs. Schnabel and Reid ended abruptly when Mr. Reid mentioned an old towing bill which was still owing from Schnabel. (ER 757.)

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[3] To KPC's $64/MBF is added $9.81/MBF representing towing and other costs paid by the mill which in an unrestrained market would be paid by the purchase logger. (Ex. A-4137, SER 292.) The defendants paid such costs in lieu of increasing reported log prices in order to avoid stumpage increases. (ER 723-24.) KPC argues that an additional $1.37/MBF should be added because of the court's finding that the price conversion should include an allowance for "profit and risk" on the assumed cost items. (FF XV.A.9.) However, such allowance is already inherent in most of the cost figures on KPC's books (for towing and scaling, for example) because the services were performed by third party contractors; the logger would pay the third parties no more than the defendants paid them. The defendants' expert upon whose analysis the court relied in part did not add a "profit and risk" factor on mill-borne cost items in his computation of a market price. (Ex. A-4137, SER 278.) $73.81 is thus a reasonable equivalent "mill pond" price. Even at the $75.18 figure defendants urge, however, it is obvious that KPC's offer was far below competitive levels.

The market was devoid of competitive prices. KPC's action in offering Reid Brothers only an artificially low single price for the entire Muddy River No. 3 production was an exercise of defendants' monopoly power and an act pursuant to their ongoing conspiracy in restraint of trade.

4. KPC's requirement that Reid Brothers surrender ownership of the timber sale was a further act pursuant to the combination and conspiracy, and an exercise of monopoly power. The defendants argue that "RBLC's entire claim for injury is based on its transfer of ownership of a timber sale, the Muddy River No. 3 sale, to KPC in 1972." (KPC Petition, p. 7). They repeatedly made the same argument to the trial court and the court of appeals. However, their assertion is incorrect. What damaged Reid Brothers was the defendants' unlawful destruction of competition in the market. Purchase loggers *never* received competitive prices, based on supply and demand and reflecting end product values, from the defendants during the conspiracy period. Instead they were paid only the artificially low administered prices which kept them under defendants' control. If Reid Brothers had logged the entire Muddy River No. 3 sale as a purchase logger, and had never transferred ownership of the timber sale to KPC, its damages would be virtually identical to the amount found by the court. (ER 761.) The defendants' conspiracy and monopolization stifled competition throughout the years 1972-73, when plaintiff was logging, and 1974, when it would have been logging, *supra*. KPC's appropration of the Muddy River sale, while not essential to plaintiff's recovery, was symptomatic of defendants' market control. The court has found that "[h]ad the market in Southeastern Alaska not been artificially restrained by defendants, Reid Brothers would not have agreed to log Muddy River No. 3 as a contract logger for KPC." (FF XV.A.11.)

Reid Brothers needed only about $65,000 for startup expenses. (ER 758, 1857-58.)[4] In a competitive market mills seeking to purchase logs would advance startup money, such as that needed by plaintiff, without requiring that the logger surrender the sale to them. Here again, the unlawful destruction of Alaska Prince was directly connected to plaintiff's damages. Alaska Prince, while still a competitor, advanced substantial startup money without requiring a third-party agreement or other concessions. (ER 758-59.) Even the defendants had historically advanced startup funds without requiring a transfer of the sale. (ER 759.) In the presence of competition price offers for 1973-74 logs would have related economically to end product values, and Reid Brothers could have started in 1972 with a contract subject to periodic price adjustment (as it had with Alaska Prince on an earlier sale, ER 750). It could also have waited until 1973 to start the project at higher prices—it had until 1977 to complete the logging under its contract with the Forest Service (Ex. 126)—but that would have been pointless in view of the defendants' collusive destruction of free market prices.

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[4] A logging tower and second truck would not have been needed until 1973, at which time they could have been leased. (ER 758.) KPC's argument that it "advanced" hundreds of thousands to Reid Brothers is untenable. (ER 1857-58.) There was no "advance" at all concerning the tower; it was leased by KPC to plaintiff at $2/MBF, which the mill collected in 1972 although the tower did not arrive until 1973. The payments for logs were for logs actually rafted, (*i.e.*, work completed) and for road-building were for roads actually completed. These items and the truck payments were deducted from log settlements due to Reid Brothers. (ER 760, 1857-58.) The log credits due Reid Brothers nearly equaled the total advances and payments according to the final accounting even though KPC wrongfully terminated Reid Brothers after it had completed the expensive steps of moving in, preparing the site, and building roads, and before it could begin logging the easier and more productive part of the sale. (ER 764, 787, 1858.) The company's payment of bills, about which defendants complain, included logging debts as well as gravel debts, and included payment in both categories to suppliers whose continued business was necessary for the current logging work. (ER 1858.)

Mr. Reid told KPC that the $64 price quoted was "way too low." (ER 759.) There was discussion of KPC's providing the use of a tower and a second truck, and making road advances to be repaid out of log proceeds. (ER 760.) A few days later, Mr. Finney flew to Petersburg with documents for the Reids to sign. These included a detailed logging contract and a third-party agreement. After the deductions which KPC would make, the payments to Reid Brothers would be about $38/MBF net. (ER 760.)

KPC's contention that it required the third-party agreement as "security" for the startup money it advanced cannot stand the light of day. If KPC had really wanted security it would not have had to strip Reid of ownership of the sale to get it. The applicable Department of Agriculture regulation and Forest Service Manual provisions specifically authorized the creation of security interests in timber sale contracts and even provided a form to be used. The defendant could have advanced the funds on the security of logs to be provided, with Reid Brothers keeping its status as a purchase logger. Reid Brothers owed nothing to KPC, and KPC had never written off any indebtedness from Reid Brothers. (ER 760.)

Thus, KPC's requirement of the third-party agreement was a further anticompetitive act which would not have been carried out but for the defendants' conspiracy and monopolization. The court has properly found that but for the defendants' antitrust violations Reid Brothers would not have been a contract logger for KPC. (FF XV.A.11.)

The district court found that in an unrestrained market Reid Brothers could have obtained the necessary start-up financing to log at Muddy River, and that KPC eventually breached its contract with respondent. Since neither of these findings is raised in the petitions for certiorari, they need not be discussed herein.

5. **Amount of damages.** Reid Brothers' damages equal the difference between what it actually received, and what it would have received in a market unrestrained by the defendants' Sherman Act violations. The revenues and costs found by the district court in assessing damages are as follows:

	1972	1973	1974	Total
Revenues	45,977	1,051,003	1,014,858	2,111,838
Costs	46,631	814,604	753,976	1,615,211
Profit or (Loss)	(654)	236,399	260,882	496,627

The per-MBF figures implicit in the findings are as follows:

	1972	1973	1974
Revenues	70.03	105.91	123.43
Costs	71.03	82.09	91.70

(FF XV.A.15-19; Ex. A-4137, SER 278.)

These findings reflected a conservative approach by the court to measuring damages. The district court noted that it was "not adopting wholesale the testimony of any expert by either side" regarding damages. (ER 2410.) The finding on lost revenue reflects the district judge's determination based on all the evidence. The defendants have not argued over the amount of damage, as distinguished from the fact of damage, in their petitions to this Court; it should be noted, however, that this Court has long held that in computing damages in antitrust cases that justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong created. *Bigelow* v. *RKO Radio Pictures, Inc.*, 337 U.S. 251, 265 (1946). The trier of fact may thus fix the amount of damages by estimate. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra*, 395 U.S. at 113-14 n.9, 123-25.

6. **Lost profits for 1973-74 are properly measured by what actually happened in the market.** Defendants also argue that the profits Reid Brothers lost in 1973-74 should be measured not by what actually happened in the market in those seasons but by what the parties might have guessed would happen at the time KPC obtained the third-party agreement from Reid Brothers in 1972. This argument was properly rejected by the district court both before and after the trial. (ER 1864; SER 65-69.) Reid Brothers was entitled to recover the lost profits it would have earned but for the defendants' antitrust violations. As the district court ruled before trial, "[p]laintiff can elect to recover those lost profits it would have received had plaintiff logged the entire Muddy River operation as a purchase logger. . . ." (SER 68.) The damages are the loss of operating profits, not the deprivation of an "asset." As noted above, plaintiff would have the same antitrust claim had it logged not only in parts of 1972 and 1973, as it actually did, but throughout those years and in 1974 as well.

In measuring the damages the court looks to the best evidence available—and wherever possible bases them on what actually occurred in the market. *See Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).[5]

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[5] There is no case from any jurisdiction which would support defendants' argument. The dicta in *Standard Oil Co. of California* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), cited by defendants, did not speak at all to the recovery of lost profits, only to the distinct subject of good will valuation. In the context of lost profits, the *Moore* dicta

7. **The defendants here committed injury-causing overt acts within the four-year period, but proof of such acts is not a prerequisite to recovery.** The district court found an ongoing conspiracy with numerous overt acts by both defendants committed pursuant to it through and including 1975. The court of appeals noted that "the evidence clearly shows the continuing existence of the conspiracy through at least 1975," and that there was "substantial evidence of sustained illegal activity during the limitations period." 699 F.2d at 1305-06. The evidence clearly established that the defendants committed several injury-causing overt acts against Reid Brothers during the damages years 1972-1974. For example, KPC destroyed Alaska Prince which was buying logs from plaintiff; ALP refrained from making any offer for plaintiff's Muddy River No. 3 logs; KPC made Reid Brothers only a single-price three-year offer at an artificially low level; KPC required that Reid Brothers surrender the Muddy River sale to it as a condition of advancing startup money; and both defendants continued all aspects of their unlawful conspiracy and monopolization which wiped competition for logs out of the market.

The question which petitioners purport to bring before the Court—"[w]hether the courts below erred in finding defendants liable under the antitrust laws based on evidence of alleged conduct well outside the four-year statute of limitations period"—simply does not exist on this record. The evidence and findings plainly show an unlawful conspiracy and monopolization starting in earlier years and continuing through the damages period, with overt acts carried out

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have been rejected. *Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659, 670 (5th Cir. 1974). *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969) merely held that the plaintiff could recover lost past profits plus lost future profits or going concern value, but not both of the latter two, and that on the facts of that case an estimate of future profits over a ten-year span was speculative; it did *not* hold that profits for any historical period should be measured by anything other than actual market statistics for that period.

against the plaintiff in the four-year period before the action was filed.

Reid Brothers' proof more than complied with the requirements of the law. Where the plaintiff is a seller whose receipts have been lessened by a conspiracy the recoverable damage is the difference between what he did realize and what he would have received but for the conspiracy. No further "acts" are required. 15 von Kalinowski, *Antitrust Laws and Trade Regulation* § 115.03[3] (1980), at 115-27, citing *American Crystal Sugar Co.* v. *Mandeville Island Farms*, 195 F.2d 622 (9th Cir. 1962). In a Section 2 case brought against purchasers who have monopolized in procurement, the same basic measure is applied. 15 von Kalinowski, *supra*, at 115-27, citing *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1962), *cert. denied sub. nom. Wade* v. *Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962).

The argument that the proof must show "unlawful" acts within the four-year damage period overlooks the rule that acts otherwise lawful are nonetheless actionable if carried out pursuant to the combination and conspiracy. This Court expressly rejected the defendants' argument in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 333 (1971), stating:

> . . . HRI contends, and the Court of Appeals held, that the statute permits the recovery only of those damages caused by overt acts committed during the four-year period. We do not agree.

The Court in *Zenith* went on to make clear that where there is a continuing conspiracy, a cause of action accrues to the plaintiff each time he is injured by it. *Id.* at 338-39.[6]

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[6] Here, the court has expressly found a continuing conspiracy through 1975. The law presumes, in any event, that violations of this nature continued in the absence of clear evidence of their termination. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 119 (1969). The defendants have relied largely on statute of limitations cases where a single act caused the injury. Such cases are not applicable here. *See Pioneer Co.* v. *Talon, Inc.*, 462 F.2d 1106, 1108-09 (8th Cir. 1972).

A plaintiff whose sale prices were restrained need not have any dealings with the defendants at all, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948); and it is a sufficient "act" that the defendants continued their conspiratorial or monopolistic pattern of conduct. The "lessening of competition" is what gives rise to compensable injury. *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 128 (9th Cir. 1973). The court here has found that "[h]ad either defendant commenced to pay competitive log prices, the other would have been compelled to follow suit; but that did not occur." (FF XII.A.5, ER 2442.)

The same rule applies under Sherman Act § 2. Damages caused by an ongoing monopolization are recoverable although the acts whereby the defendants gained monopoly power occurred more than four years earlier. *Hanover Shoe* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968). The Court there held that "although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955." *Id.* at 502, n.15.[7]

C. Defendants Waived A Jury Trial And Affirmatively Sought A Trial To The Court

Although defendants now argue that they should have had a trial by jury, their position in the district court was the opposite until ALP attempted to reverse its field when defendants at last were faced with a trial date. Defendants waived a jury trial by moving to strike plaintiff's jury demand and insisting that the case be tried to the court. (SER 7-35.) Moreover, after plaintiff withdrew its jury demand in order to obtain a trial date, KPC expressly waived the jury demand to the same extent that plaintiff had waived it. (SER 63-64.) ALP filed a jury demand shortly before trial in 1980, more than five years after the action was commenced. (ER 346.) The court struck the belated demand pursuant to a memorandum decision. (ER 408-11.) Defendants did not seek interlocutory review of that order; instead, they proceeded to try the case to the court over the next several months.

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[7] *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), relied upon by defendants, does not support their position. The court there held that in a suit against a *pristine* monopolist—one whose market position was gained without taint of collusive or anticompetitive conduct—the recoverable damages were those which flowed from its recent anticompetitive practices. But the court also made clear that its holding would *not* apply where the monopoly power was attained in the first place through collusive or predatory practices. In that event, the measure of damages would remain as before: *i.e.*, the difference between what the plaintiff actually received (or paid) in the restrained market and what it would have experienced in a market free of the restraints. *Id.*, 603 F.2d at 297.

Plaintiff demanded a jury at the outset in 1975. (ER 1, 15.) Neither defendant did so. In 1978, defendants moved to strike palintiff's jury demand. (SER 7-8.) ALP argues now that this motion applied to "a consolidated trial [of] the facts of five complex and diverse antitrust cases." (ALP Petition, p. 3). But defendants persisted in their motion to strike, and demanded a bench trial as to Reid Brothers alone, after this case had been designated for a separate trial. On August 30, 1978 Judge Sharp ruled in a written order that Reid Brothers "shall be the first case to be tried." (SER 36.) Several weeks later, KPC and ALP filed a joint reply memorandum again urging the court to strike the jury demand. (SER 38-45.) They pointed out that the court had ordered the Reid Brothers case to be tried first. (SER 39.) They argued that the case was too complex for a jury to understand and that they would be denied due process of law unless it were tried to the court. (SER 40-43.) A jury, they insisted, would be "an incompetent fact finder" in the Reid Brothers action. (SER 41.) They accused plaintiff of "banking on the inability of a jury to understand the issues . . ." (SER 40.) They added (SER 42):

> . . . The court's ruling separating the Reid Brothers case for trial first will alleviate but not overcome the concerns

which prompted defendants' motion to strike the demand for jury.

On May 21, 1980, the court set the case for trial on July 28, 1980. At a pretrial conference on June 5, 1980, the district judge mentioned that the extreme calendar congestion in the district would make it more difficult to hold the trial date for a jury trial and asked that consideration be given to a bench trial. Plaintiff, which although it preferred a jury trial had waited over five years for its day in court and could wait no longer, responded with a letter waiving its jury demand as to a trial to commence in the summer of 1980.

KPC, in open court at the hearing held on June 5, 1980, expressly waived its rights, if any, to a jury trial, "to the same extent and only to the extent that Mr. Dwyer has waived [illegible] for the plaintiff in his letter to Your Honor . . ." (SER 64.) KPC did not condition its waiver on the position ALP might take one way or the other. Petitioners now argue that KPC "refused to consent to the withdrawal [of Reid Brothers' jury demand] unless all parties agreed." (ALP Petition, p. 4). That is simply not true. The defendants apparently are referring to a written statement filed by KPC on June 20, 1980 (CR 480), two weeks after it stipulated in open court to a bench trial. The record is clear that KPC expressly consented without qualification to the withdrawal of plaintiff's jury demand, and the court of appeals has correctly so noted. 699 F.2d at 1304. KPC is thus unquestionably bound by the result of the ensuing trial to the court.

ALP by a letter dated June 6, 1980, said it would not consent to a bench trial and that it demanded a jury. (ER 346.) The court on motion struck this untimely demand, finding that ALP had waived any right to a trial by jury and stating in part (ALP App. A-69-72):

> ALP argues that its motion to strike jury demand, filed on August 31, 1978, was based on the assumption that Judge Sharp intended to try the five timber cases together. ALP claims that its present change of position on the jury issue is based on events, mainly the decision to

try the Reid Brothers' case alone, that transpired after it filed its August 31 motion.

Upon review of the record, however, it is clear that ALP opposed plaintiff's jury demand both before and after defendant was told that the Reid Brothers' case would be tried apart from the remaining four timber cases. At a preliminary pretrial conference and by order on August 30, 1978, Judge Sharp informed the parties of his intention to segregate the trials. Defendants noted this development in their October 18, 1978, reply memorandum supporting their motion to strike jury demand, but nevertheless continued to emphatically persist in their position that a jury could not comprehend the complexities of this large antitrust case. *See* Defendants' Reply Memorandum Supporting Motion to Strike Jury Demand (October 18, 1978) at II-1—II-7. With knowledge that the Reid Brothers' case would be tried first, defendants stated that a jury would be an incompetent fact-finder because of (1) plaintiff's intention to "reach back to 1959" to find documentation supporting the allegations of conspiracy, (2) plaintiff's desire to introduce evidence of the circumstances surrounding the demise of the many independent loggers in Alaska, and (3) the complex accounting issues, timber terminology and government regulations that would be in issue in the case.

There has been no change in the posture of this case since defendants filed their reply memorandum in support of their motion to strike that would support ALP's contention that the issues have changed substantially. In his November 22, 1978, Order on Defendants' Summary Judgment Motions Judge Sharp denied all of defendants' motions pertaining to plaintiff Reid Brothers. At a preliminary pretrial conference on May 29, 1980, and by formal order issued on the same day, this Court denied defendants' Motion to Exclude Evidence Concerning the Circumstances Causing Ninety-Nine Other Loggers to Quit Business. Essentially, the same case that ALP repeatedly said should not or could not be tried to a jury is now ready for trial on July 28, 1980.

It is clear from the course of events that ALP has opposed plaintiff's jury demand both before and after defendant learned that the Reid Brothers' case would be tried apart from the other cases. There has been no development or

> change in circumstances in this case since defendants filed their reply memorandum in their motion to strike that would indicate that ALP's waiver of a trial by jury was anything but knowledgeable and intentional.
>
> ALP has not withheld its jury demand in reliance upon the demand filed by another party. To the contrary, ALP has clearly and steadfastly expressed its desire to have this case tried to the Court. Rule 38(d) does not prevent this Court from finding that ALP has waived its right to a jury trial.

Under Fed. R. Civ. P. Rule 38(d), a party who fails to make a timely demand waives trial by jury. The provision that a jury demand once made may not be withdrawn without consent is designed to allow parties to rely upon jury demands filed by their opponents. *DePinto* v. *Provident Security Life Insurance Company*, 323 F.2d 826, 832 (9th Cir. 1963); *Thomas* v. *Peninsular & Oriental Steam Navigation Company*, 246 F. Supp. 492, 594 (E.D. Pa. 1965). But here it is manifest, and the court found, that ALP did not rely upon plaintiff's jury demand; to the contrary, it bent every effort to defeat that demand, even claiming a violation of its constitutional rights if the case were not tried to the court. (ER 409.)

Under Rule 38 a jury trial may be waived even through inadvertence. 9 Wright & Miller, *Federal Practice & Procedure* § 2321, p. 102; *Chandler Supply Co.* v. *GAF Corp.*, 650 F.2d 983, 987 (9th Cir. 1980). No special form is required, and waiver may be found in the conduct of the parties. 9 Wright & Miller, *supra*, § 2321, p. 102; *Palmer* v. *United States*, 652 F.2d 893, 896 (9th Cir. 1981). Waiver can also be accomplished by an oral statement of counsel. *West* v. *Devitt*, 311 F.2d 787, 788 (8th Cir. 1963); *Country (Social) Club of Savannah, Inc.* v. *Sutherland*, 411 F.2d 599, 600 (5th Cir. 1969). Once a waiver has been made, it cannot be set aside because of the party's later change of mind. *West* v. *Devitt*, *supra*. Even the kind of unintentional waiver specified in Rule 38(d)—failure to file a written demand for a jury within ten days after the issue has been joined—is irrevocable. 9 *Wright & Miller*, *supra*, § 2321, p. 102.

The cases cited by petitioners are inapposite. For example, in *DePinto* v. *Provident Security Life Ins. Co.*, 323 F.2d 826, 832 (9th Cir. 1963), the court noted that the failure to file a jury demand "does not constitute a waiver if such demand is withheld in reliance upon a demand filed by another party. . . ." The party in *DePinto* had not filed express and repeated written waivers, as defendants did here. In *Palmer* v. *United States*, *supra*, the court held that plaintiff's silence after having properly made a jury demand did not constitute a waiver, whereas active conduct of the parties could constitute a waiver. *Id.* at 896. *Rosen* v. *Dick*, 639 F.2d 82, 92 (2d Cir. 1980) is not in point and merely confirms that reliance by the non-demanding party upon its opponent's jury demand, totally absent here, is required.

Both petitioners here repeatedly demanded a bench trial in the very case which in fact went to trial. The court of appeals correctly affirmed the district court's ruling. 699 F.2d at 1303-05.

CONCLUSION

For the reasons stated above and in respondent's brief in opposition in No. 83-307, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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